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Supreme Court of the United States

OCTOBER TERM, 1995

FRANCIS BERNARD AUER, *et al*,
Petitioners,

v.

DAVID A. ROBBINS, *et al.*,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 94-3355/3534

FRANCIS BERNARD AUER; CHRISTOPHER JAMES DAY; JAMES GILBERT HALL; FRANCIS B. CORONA; ANTHONY PONA; MICHAEL T. INDELICATO; RICHARD BUEHLER; JAMES E. LONG; ROY BURGDORF; DONALD SWANSON; LIONEL ABERNATHY; KENNETH ACKERMAN; ALFRED ADKINS; DUANE ALEXANDER; STEVE W. ALSUP; ROGER AMELUNG; JAMES ANDERSON; MICHAEL ANDERSON; EDWARD L. ATHERTON; ROOSEVELT BARNES, JR.; VERNON BARTON; RICHARD C. BARTRAM; LEE BATES; DARREL BATTLE; ROBERT W. BAYLESS; MICHAEL BECK; DENNIS BECKER; JOSEPH D. BEFFA; CHRIS BEFFA; MICHAEL BERGMAN; JOHN BILLINGS; MICHAEL BLANKS; LEONARD BOBER; DONALD L. BOHNERT; ROBERT L. BONZON; FRANK BOOKER; FRED BOYD; KENNETH M. BRADSHAW; ROBERT BRENNAN; JOSEPH BURGOON; JOHN M. BURKE; THOMAS BURKE; JAY BURKHARD; SHADRACH J. BURKS; AL CARTER; MICHAEL CARUSO; SALVATORE CHRUM; EARL COBB; WALTER COLLIER; DONALD COLUMBO; CLARENCE CONTESTABILE; PHILLIP P. CORNISH; DON CUMMINGS; STANLEY CUNNINGHAM; GORDON CURD; THOMAS J. DALEY; JEROME DAMPIER; ROBERT DAVIS; STEVE DEBISSCHOP; ROBERT DECKER; MANUEL DELGADO; EDWARD S. DICKERSON; LEMAN DOBBINS; JERRY DODSON; JAMES M. DOGGENDORF; STEPHEN DOUGHERTY; ROBERT DOWNEY; ROBERT J. DUFFIN; DANIEL DUFFY; JUDITH DUPIUS; JIMMIE LEE EADS; DONALD EBNER;

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Appellants/Cross-Appellees,

v.

DAVID A. ROBBINS, Member of City of St. Louis Board of Police Commissioners and its acting president.; RITA M. KRAPF, Member of St. Louis Board of Police Commissioners; JAMES F. CONWAY, Member of St. Louis Board of Police Commissioners; CHARLES MISCHEAUX, Member of St. Louis Board of Police Commissioners; FREEMAN BOSLEY, JR., Member of City of St. Louis Board of Police Commissioners,

Appellees/Cross-Appellants.

Appeal and Cross-Appeal from the
United States District Court for the
Eastern District of Missouri

Submitted: May 17, 1995

Filed: September 8, 1995

Before BOWMAN, MAGILL, and LOKEN, Circuit Judges.

MAGILL, Circuit Judge

Plaintiffs appeal the district court's judgment, after a court trial, that twenty-one categories of St. Louis police sergeants are exempt from the requirements of the Fair Labor Standards Act (FLSA). Defendants, all members of the St. Louis Board of Police Commissioners (the board), cross-appeal the district court's finding that two categories of St. Louis police sergeants are partially non-exempt from the requirements of the FLSA. Because we believe that all of the St. Louis police sergeants are exempt from the FLSA, we affirm in part and reverse in part.

I. BACKGROUND

The St. Louis police department (the department) is divided into five separate bureaus. The department's basic patrol duties are the responsibility of the Bureau of Community Policing, which is divided into eight districts. The Bureau of Investigation investigates crimes throughout St. Louis. The Bureau of Patrol Support provides support functions to the districts and the Bureau of Community Policing. The Bureau of Administration provides administrative support to the department. And the Bureau of Professional Standards trains and reviews the performance of departmental personnel.

In addition to departmental divisions, there is vertical segregation between the command staff and the patrol staff of the department. The command staff includes all personnel at the rank of lieutenant and higher. Members of the command staff undertake the basic managerial duties of the department, and drive unmarked cars, wear white uniforms and do not regularly patrol the streets.

The department's patrol staff includes patrol officers, investigators and sergeants. Members of the patrol staff provide day-to-day law enforcement services to the public. Members of the patrol staff, including sergeants, patrol the streets of St. Louis, drive marked police cars and

possess standard police equipment. Investigators, including sergeants, visit crime scenes, interview witnesses, follow leads, analyze results, make arrests and aid in prosecuting criminal suspects.

Pursuant to state statute, no St. Louis police officer with the rank of sergeant or higher is allowed overtime pay.[1] In October 1988, Francis Auer, Christopher Day and James Hall, all sergeants in the department, filed suit against the department, alleging that it failed to pay them overtime wage benefits in violation of the FLSA. Additional similarly situated plaintiffs, including one lieutenant, joined the suit by filing individual consent forms. The district court granted summary judgment in favor of the police department with respect to Lt. Manual Delgado, ruling that (1) any officer of the rank of lieutenant or higher was an exempt administrator; and (2) lieutenants and sergeants were salaried, not hourly employees. At the time of trial, there were over 200 plaintiffs, all of whom were either past or present sergeants in the department.

Plaintiffs' claims proceeded to a five-day bench trial. The district court found that sixteen sergeant positions were exempt from the FLSA under the executive exemption,[2] three sergeant positions were exempt under the ad-

[1] Mo. Rev. Stat. § 84.160(4) (Supp. 1995) provides that:

> Each of the above mentioned salaries shall be payable in biweekly installments. Each officer of police and patrolman whose regular assignment requires nonuniformed attire may receive, in addition to his salary, an allowance not to exceed three hundred sixty dollars per annum payable biweekly. *No additional compensation or compensatory time off for overtime, court time, or standby court time shall be paid or allowed to any officer of the rank of sergeant or above.* (emphasis added).

[2] These sergeant positions are: precinct; detective; desk; intelligence; homicide; auto theft/fraud division; narcotics/vice division; sex crimes/child abuse; warrant/fugitive division; public afairs; mounted patrol/mobile reserve/canine unit; prisoner processing; identification section; traffic safety; academy and evidence technician unit.

ministrative exemption,[3] and one sergeant position was exempt under the combined exemption.[4] The district court aso found that two sergeant positions were partially non-exempt from the FLSA.[5] Both parties have appealed the decision of the district court.

II. DISCUSSION

As a general rule, the FLSA requires employers to pay overtime compensation to employees for hours worked in excess of a forty-hour work week. *See* 29 U.S.C. § 207 (1988). However, under the FLSA, an employer does not have to pay overtime compensation to an employee working in "a bona fide executive, administrative, or professional capacity." 29 U.S.C. § 213(a)(1) (1988). The FLSA delegates the responsibility to define these terms to the Secretary of Labor. 29 U.S.C. § 213(a)(1).

The regulations provide a "short test" and a "long test" to determine whether an employee falls under either the executive or the administrative exemption. 29 C.F.R. §§ 541.1, 541.2. Under either test, the board bears the burden of proving that the exemption applies. The "short test" applies if an employee is paid a salary of at least $250 per week. Plaintiffs stipulated that they received at least $250 per week in compensation but argue that they were not paid on a salary basis. Accordingly, the first question we address is whether the sergeants were compensated on a salary basis.

A. Salary Test

Plaintiffs argue that the district court erred in determining they are salaried employees because they may be

[3] These sergeant positions are: job performance, internal affairs and quality control sergeants.

[4] This position is the special assignments sergeant.

[5] These positions are the bomb and arson squad and the traffic safety sergeant while acting as an accident reconstruction squad sergeant.

subject to disciplinary reductions in their pay. Plaintiffs point to the testimony of Sergeant Michael Guzy that he received a two-day suspension without pay for violating the city's residence requirement.

Under the regulations, an employee is not salaried if he may receive deductions from his salary "because of variations in the quality or quantity of the work performed." *McDonnell v. Omaha, Neb.*, 999 F.2d 293, 296 (8th Cir. 1993) (quoting 29 C.F.R. § 541.118(a)),[6] *cert. denied*, 114 S. Ct. 1188 (1994). In other words, an employee is entitled to overtime compensation only if his compensation is not subject to reductions based upon the quality or quantity of the work performed. *Hurley v. Oregon*, 27 F.3d 392, 394 (9th Cir. 1994).

The mere possibility of an improper deduction in pay does not defeat an employee's salaried status. *McDonnell*, 999 F.2d at 296. In *McDonnell*, we refused to hold that fire chiefs were nonsalaried because they could be subject to a reduction in compensation if they were absent from work for less than one day unless they were able to use annual leave, sick leave or other leave with pay entitlement. *Id.* The evidence presented in *McDonnell* showed that no chief had ever received such a deduction in pay. Accordingly, under *McDonnell*, we will not hold that an employee is not salaried if there is only a contingent possibility that an improper deduction may occur.

The regulations, however, provide an exception to the rule that an employee subject to pay reductions based

[6] The Ninth Circuit held that this regulation is invalid as applied to the public sector. *Service Employees Int'l Union, Local 102 v. San Diego*, —— F.3d ——, 1994 WL 814621, at *7-8 (9th Cir. July 19, 1995), *pet. for reh'g en banc filed* (July 27, 1995). However, the Seventh Circuit holds that the regulation is valid as applied to the public sector because it is rationally related to the objectives of the FLSA. *Mueller v. Reich*, 54 F.3d 458, 442 (7th Cir. 1995). We need not address this question, however, and assume, without deciding, that the regulation validly applies to public sector employees.

on the quality or quantity of work is not salaried: "Penalties imposed in good faith for infractions of safety rules of major significance will not affect the employee's salaried status." 29 C.F.R. § 541.118(a)(5). Conversely, an employee is considered nonsalaried, and thereby entitled to overtime compensation, if his compensation is subject to reduction for a violation of any other rules. *Hurley*, 27 F.3d at 394. A safety rule of major significance includes "only those relating to the prevention of serious danger to the plant, or other employees, such as rules prohibiting smoking in explosive plants, oil refineries, and coal mines." 29 C.F.R. § 541.118(a)(5). Sergeant Guzy's violation of the department's city residency requirement is not a major safety rule under the regulation's definition. Arguably, the department's two-day pay deduction from Sergeant Guzy would require him to be treated as a nonsalaried employee.

A one-time deduction, however, does not automatically require the determination that all sergeants are nonsalaried. The regulations provide for a "window of correction" and state that "[t]he effect of making a deduction which is not permitted under these interpretations will depend upon the facts in the particular case." 29 C.F.R. § 541.118(a)(6). The regulations further state that if "a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future." *Id.* In other words, "the 'window of correction' allows employers to treat otherwise eligible employees as salaried, regardless of the employer's *one-time* or unintentional failure to adhere to § 541.118(a)'s requirements." *Martin v. Malcolm Pirnie, Inc.*, 949 F.2d 611, 616 (2d Cir. 1991) (emphasis added), *cert. denied*, 113 S. Ct. 298 (1992).[7]

[7] Because the regulation is written in the disjunctive, it is not material that the deduction from Sergeant Guzy's pay was not

The "window of correction" is not available if the employer has a settled policy of making improper deductions from compensation. *Id.* Under the unique circumstances surrounding Sergeant Guzy's disciplinary loss of pay, we believe that the department made a one-time deduction, and did not make the disciplinary deduction from Sergeant Guzy pursuant to an established policy.

In 1990, Sergeant Guzy faced termination by the department for violating its city residency requirement. In lieu of possible termination, Sergeant Guzy agreed to waive his right to a hearing and accept a two-day suspension without pay. Subsequent to this incident, on June 1, 1991, the department changed its policy to provide that termination is the exclusive disciplinary sanction for violation of the residency requirement. Accordingly, the Guzy disciplinary incident was a one-time incident and can never reoccur because the department has since changed its policy. Finally, it fits within the "window of correction's" express requirement that the deduction be "for reasons other than for lack of work," because it was imposed as a disciplinary measure. Thus, we will not reverse the district court's determination that all sergeants were paid on a salary basis. In such a situation, the regulations simply require the employer to reimburse the employee for the lost wages. 29 C.F.R. § 541.118(a)(6).

B. Executive Exemption

We now address whether the district court properly concluded that (1) the executive exemption applied to fifteen categories of sergeants, thus removing them from the overtime pay requirements of the FLSA, and (2) two categories of seregants were partially exempt executives, and partially nonexempt from the FLSA. Because the sergeants were salaried employees, earning at least $250

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inadvertent, as long as it was made for reasons other than lack of work. *Lee v. Flightsafety Servs. Corp.*, 20 F.3d 428, 433 (11th Cir. 1994).

per week, this question turns on whether both prongs of the "short test" apply.[8] Under the short test, an employee is an exempt executive if the employer can show that the employee's "primary duty consists of the management of the enterprise in which the employee is employed or of a

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[8] If the sergeants earned less than $250 per week, the board would have to satisfy a more stringent test to establish that plaintiffs were exempt as executives—the so-called "long test." The elements of the long test are:

> The term *employee employed in a bona fide executive . . . capacity* in section 13(a)(1) of the Act shall mean any employee:
>
> (a) Whose primary duty consists of the management of the enterprise in which he is employed or of a customarily recognized department of subdivision thereof; and
>
> (b) Who customarily and regularly directs the work of two or more other employees therein; and
>
> (c) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; and
>
> (d) Who customarily and regularly exercises discretionary powers; and
>
> (e) Who does not devote more than 20 percent, or, in the case of an employee of a retail or service establishment who does not devote as much as 40 percent, of his hours of work in the workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (d) of this section: *Provided*, That this paragraph shall not apply in the case of an employee who is in sole charge of an independent establishment or a physically separated branch establishment, or who owns at least a 20-percent interest in the enterprise in which he is employed; and
>
> (f) Who is compensated for his services on a salary basis at a rate of not less than $155 per week (or $130 per week, if employed by other than the Federal Government in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities . . . .

29 C.F.R. § 541.1(a)-(f).

customarily recognized department or subdivision thereof, and includes the customary and regular direction of the work of two or more other employees . . . ." 29 U.S.C. § 541.1(f). Plaintiffs concede that they "regularly direct the work of two or more employees." Accordingly, resolution of this issue depends upon whether the sergeants had management as their primary duty.

We review the district court's finding of the amount of time devoted and the significance of the sergeants' managerial duties for clear eror. The district court's determination that the exemption applies is a legal determination that we review de novo. *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986); *Shockley v. Newport News*, 997 F.2d 18, 26 (4th Cir. 1993). Plaintiffs argue that insufficient evidence exists to support the district court's finding that their primary duty was management. As a corollary to this argument, they also argue that the district court failed to make sufficient findings of fact regarding the sergeant's particular job duties. Finally, plaintiffs argue that the district court committed reversible error by concluding that the amount of time spent on managerial, as opposed to nonmanagerial, duties was irrelevant. We address the time spent on duties argument first.

Determining whether an employee's primary duty is management depends upon "all the facts in a particular case." 29 C.F.R. § 541.103. As a general rule, the regulations provide that if an employee spends over 50% of his time on managerial duties, his primary duty is management. *Id.* However, if an employee spends less than 50% of his time on managerial duties, he is not presumed to have a primary duty of nonmanagement. *Id.* In *Murray v. Stuckey's, Inc.*, we held that a finding with respect to the amount of time spent on nonmangerial job duties is not a determinative factor under the regulations when the employee spends less than 50% of his time performing managerial duties. 939 F.2d 614, 618 (8th Cir. 1991), *cert. denied*, 112 S. Ct. 970 (1922). We agree with plaintiffs that under the regulations and *Murray*, time still remains a relevant factor.

We do not read the district court's opinion as disregarding the time that plaintiffs spent on particular job duties. In determining whether plaintiffs were exempt from the provisions of the FLSA, the district court examined each sergeant category's job duties to determine its primary duty, considering four factors:

1. The relative importance of the managerial duties as compared with other types of duties;
2. The frequency with which the employee exercises discretionary powers;
3. The employee's relative freedom from supervision;
4. The relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work performed by the supervisor.

Addendum at 20. The district court's four-prong test whether a sergeant's primary duty is management if he spends less than 50% of his time performing managerial duties. *See* 29 C.F.R. §§ 541.102, 541.103; *Murray*, 939 F.2d at 618. With respect to all of the sergeant categories, the district court determined that the fourth factor—the salary factor—of the four-prong test weighed in favor of holding the sergeants' primary duty was management. The court found that in 1979, when the Missouri legislature determined it would no longer pay sergeants overtime compensation, it raised their compensation 8%. It also found that a beginning sergeant's compensation was 42% greater than a beginning turnkey officer and 34% greater than a beginning patrol officer. Accordingly, it found that all sergeants received a higher

compensation when they performed the same duties as nonexempt patrol officers and turnkey officers.

While the district court stated that "the amount of time spent conducting those duties is irrelevant in the Eighth Circuit as long as the primary duty is management," Addendum at 22, we do not take these statements to mean that the district court completely disregarded the time spent performing managerial, as opposed to nonmanagerial, duties. Rather, the district court's opinion should be construed as implicitly determining that no sergeant spent 50% of his time performing managerial duties. As such, the district court properly analyzed the sergeants' job duties under the test set forth in the regulations, and acknowledged by us in *Murray*, to determine whether an employee's primary duty is management if he spends less than 50% of his time performing managerial duties. We therefore reject plaintiffs' argument that the district court's decision must be reversed because it disregards the amount of time spent on managerial, as opposed to nonmanagerial, duties. We also reject plaintiffs' argument that the district court must be reversed because it did not make factual findings setting forth the amount of time spent performing exempt, as opposed to nonexempt, duties. We now turn to the specific sergeant positions to determine if sufficient evidence exists to determine that their primary duty is management, and they are therefore exempt as executives.

1. Precinct Sergeants

The district court made numerous factual findings with respect to precinct sergeants and concluded that managerial duties far outweigh any other duties performed by precinct sergeants and are frequently and constantly exercised. The court found that "[r]ank and file police officers look to the sergeants for guidance and direction, while senior officers rely upon them for accountability

and control of their areas and do not closely supervise their activities." Addendum at 23. The court also found that precinct sergeants do not primarily perform routine tasks like arrests and ticketing, but rather take charge of crime scenes, direct activity and ensure that their area is patrolled and secure. Additionally, the police manual provides that a precinct sergeant is responsible for: (1) supervising the officers assigned to his precinct; (2) crime prevention within his precinct; (3) inspecting his subordinate officers during roll call to ensure, among other things, that they are physically and mentally fit for duty and are properly assigned and understand their assignments; (4) taking necessary corrective action when he notices any deficiencies in his subordinates; (5) patrolling his precinct to ensure that his officers are at their proper assignments; and (6) for any reports that may be required. Appellants' App. at 40-41.

Plaintiffs do not argue that any of the district court's factual findings are clearly erroneous. However, they point out that precinct sergeants do not have authority, without a lieutenant's permission, to change the work assignments of the officers they supervise. Appellants' App. at 206. Plaintiffs also point out that a radio dispatcher assigns patrol cars to crime scenes and precinct sergeants typically have no authority to change these assignments. From this, plaintiffs argue that precinct sergeants are more akin to working supervisors, who are not exempt from the FLSA, than exempt executives. *See Shockley*, 997 F.2d at 26.

The district court correctly determined that precinct sergeants' primary duty is management. The sergeants are compensated at a higher salary range than their subordinates. The precinct sergeants' duties, as delineated in the police manual, clearly establish that managing subordinate patrol officers constitutes their primary duty. Precinct sergeants do not, as plaintiffs attempt to argue, perform identical tasks as their subordinates. Although

their duties may sometimes overlap with those of their subordinates, precinct sergeants are responsible for managing the precinct for which they are in charge. We believe the district court had sufficient grounds to conclude that the precinct sergeants had more responsibility and discretion over their subordinates than a "working foreman" does. *Id.* at 26-27. Thus, we affirm the decision that precinct sergeants are exempt executives.

2. Detective Sergeants

The district court found that a detective sergeant oversees the work of thirteen to sixteen detectives. It found that the detectives must provide their sergeant with all information concerning police matters and that all interrogations, interviews and investigatory procedures conducted by detectives are scrutinized and reviewed by a detective sergeant. The court further found that detective sergeants have discretion to ensure that the caseload is constantly moving. The court observed that although a detective sergeant may sometimes become directly involved in investigating matters, his primary duty is to manage and oversee the entire caseload and to report those results up the chain of command.

We have reviewed the record and do not believe that any of the district court's factual findings are clearly erroneous. These findings amply demonstrate that the detective sergeants' primary duty was management.

3. Desk Sergeants

The district court found that the desk sergeants basically manage the station house, overseeing incoming calls and walk-in traffic and delegating other officers to respond. It also found that the desk sergeants' responsibilities include ensuring the satisfactory performance of both civilians and officers within the station house, and they are accountable for all assets and facilities within the station and prisoners in the holdover. Area desk sergeants

must maintain the desk "book" of arrests made and other station business such as complaints filed; prisoner processing, maintenance and control; forwarding police reports and other forms and information; and training and supervising other desk and booking personnel. The court found that these sergeants have a great deal of discretion in performing their duties and are minimally supervised by their superiors.

Plaintiffs do not argue that any of the district court's factual findings are clearly erroneous; rather, they inform us that over half of a desk sergeant's day is spent answering the phones and taking walk-in complaints, which are the same duties that are performed by other police officers and civilians. Where an employee spends less than 50% of his time performing managerial duties, as noted above, time is a relevant, but not dispositive, factor. The district court's opinion found that all of the factors indicating that management is the primary duty were present: managerial duties were more important when compared with other types of duties; discretionary powers were frequently exercised by the desk sergeant; he is relatively free from supervision; and he receives higher compensation than the wages paid other employees for the same kinds of nonexempt work. Thus, we agree with the district court that desk sergeants have management as their primary duty, although they may devote less than 50% of their time to managerial duties.

4. Intelligence Sergeants

The district court noted that the intelligence unit gathers information on criminal activity within the St. Louis area. Each intelligence sergeart is assigned to one of three units containing six detectives. The court found that an intelligence sergeant's responsibilities include collecting data, preparing reports and analyses, briefing police personnel on current crime situations and supporting investigations. It also found that intelligence ser-

geants are "minimally supervised, exercise near unfettered discretion and enjoy a great deal of autonomy." Finally, it found that these sergeants' work product is evaluated for professionalism and the overall effectiveness of their respective units.

Plaintiffs do not challenge any of the district court's factual findings for clear error. These factual findings are more than sufficient to establish that the investigative sergeants' primary duty is management. We affirm the district court's decision that intelligence unit sergeants are exempt executives.

5. Homicide Sergeants

Homicide sergeants manage teams of investigators. The district court found that the homicide sergeants' primary duty is to oversee the investigations of reported killings and manage a caseload. The court found that the "hands on" investigative work performed by homicide sergeants is tangential to their primary duty.

We reject plaintiffs argument that these factual findings are not specific enough.[9] We disagree with plaintiffs' assertion that these findings do not reference homicide sergeants' specific duties; to the contrary, it appears to us that the district court found their duties to be the oversight of homicide investigations and caseload management.[10]

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[9] We note that neither side filed any motion pursuant to Rule 52(b) for the district court to amend its findings or to make any additional findings.

[10] Even assuming that the district court's factual findings were incomplete, "if the record sufficiently informs the court of the basis for the trial court's decision on the material issue, in question a remand is unnecessary." *Charles v. Allstate Ins. Co.*, 932 F.2d 1265, 1269 (8th Cir. 1991) (internal quotations and citation omitted). We may affirm a decision based upon incomplete factual findings "if there can be no genuine dispute about how the trial court actually resolved the facts missing from its express findings." *Id.* (internal quotations and citation omitted).

The evidence introduced at trial showed that homicide sergeants are in charge of the invesigation, review reports, perform evaluations on the detectives they supervise and have the authority to adjust the hours of subordinate detectives. Appellees' App. at 178-80. A homicide sergeant is evaluated on the basis of his supervisory skills, not his investigative skills. Testimony at trial indicated that a homicide sergeant's primary duty is to supervise an investigation, ensuring that evidence is collected properly, witnesses are interviewed properly, the area is canvassed properly, the correct measurements are taken where the body was located and to determine the cause of death with the medical examiner's office. *Id.* at 181. We believe this evidence is more than sufficient to support the district court's factual findings and agree that management is the primary duty of the homicide sergeants.

6. Auto Theft/Fraud Division Sergeants

The district court analogized the auto theft/fraud division sergeants to the homicide sergeants and found that their principal duty is caseload management and directing the investigations of stolen automobiles and reports of fraudulent activity. These sergeants assign cases to the officers under their command. Appellees' App. at 135. These sergeants do not carry their own caseload, and rarely write reports. *Id.* at 137. An auto theft sergeant's evaluation is based upon her managerial, not investigative, skills. *Id.* at 138. The sergeants also evaluate their officers, are expected to handle any grievances that may arise and initiate discipline if required. *Id.* at 139. We believe this evidence is sufficient to determine that the sergeants' primary duty is management.

7. Narcotics/Vice Division Detectives

The district court found that a narcotics sergeant manages eight officers and that a vice sergeant manages sixteen officers. It found that their primary duty is to

manage their respective departments, rather than directly handling cases.

Plaintiffs argue that these sergeants spend approximately three-fourths of their time on the street with their subordinates, investigating crimes and arresting criminals, and only one to two hours per day reading reports of criminal activity and reviewing criminal complaints from citizens. While on the street, however, the sergeants are supervising the work of their officers. Appellants' App. at 351. These sergeants assign cases to subordinates, do not carry their own caseload and plan operations with the captain's assistance. *Id.* at 348-50.

We do not believe that plaintiffs have demonstrated that the district court's finding of the significance of these sergeants' managerial duties is clearly erroneous. Accordingly, sufficient evidence exists to support the district court's conclusion that the executive exemption applies to the narcotics and vice sergeants.

8. Sex Crimes/Child Abuse Sergeant

The sergeant assigned to the sex crimes/child abuse unit is in charge of eight officers. The district court found that this sergeant's primary duty, similar to homicide, narcotics and vice, is to manage the unit's caseload and the officers reporting to the unit. Upon a thorough examination of plaintiffs' brief, we found no specific challenge to this particular finding, and we decline to address it further.

9. Warrant/Fugitive Division Sergeant

The district court found that the warrant/fugitive division maintains a liaison with the courts to ensure identification and arrest of persons with outstanding criminal or other violations of the law, and to recapture escaped prisoners. One sergeant acts as a court liaison for scheduling, another supervises four officers in the fugitive section,

and two sergeants supervise nine officers in the transport pool and four officers in the Fugitive Apprehension Strike Team. The court found that these sergeants' primary duty is management, although they may accompany their officers on field activities. The court found that when in the field, the sergeants exercise a great deal of management and discretion over the officers regarding how the capture or transport is organized.

Plaintiffs do not argue that any of these findings are clearly erroneous. Thus, we conclude that sufficient evidence exists to conclude that the executive exemption applies to these sergeants as well.

10. Public Affairs Sergeant

The district court made detailed factual findings regarding the public affairs sergeant. It found that ten officers report to this sergeant. The public affairs sergeant is responsible for coordinating all media, community relations and information dissemination functions. It further found that the ten officers working under the sergeant prepare the actual work product. The court determined that the sergeant's principal job is to "interact directly with command authority regarding how these publicity requirements will be conducted and then translate them into staff assignments."

Plaintiffs do not challenge any of these factual findings as clearly erroneous. Rather, they argue that approximately 80% of the sergeant's time is spent performing the same tasks as his subordinates perform. However, as noted above, time is only one relevant factor. In light of the district court's factual findings, sufficient evidence exists to establish that the public affairs sergeant falls within the executive exemption.

11. Mounted Patrol/Mobile Reserve Canine Units Sergeants

The district court found that the primary duties of the mounted patrol sergeant are duty roster preparation, scheduling, reviewing patrol officer fittings and equestrian equipment, and evaluating and appraising officer performance. The court also found that this sergeant has "fairly wide berth" to make assignments of mounted patrols in St. Louis park areas. The court found that the primary duty of the mounted patrol sergeant is to manage, coordinate and report the activities of the mounted patrol.

The court noted that the mobile reserve unit consists of officers who deal with crime in highly concentrated areas at peak times. This unit has two sergeants who are each in charge of ten officers. The court noted that although assignments are received from higher command authority, the sergeants have discretion to implement them so as to most effectively utilize their officers and resources.

The court found that the canine unit sergeants' principal duties involve oversight of operations, coordinating scheduling, assigning officer activities and ensuring proper care and handling of the animals. The court found that the sergeants "provide little in the way of direct patrol of the streets, and are accountable for all administrative and performance aspects of the unit."

Plaintiffs do not challenge any of these factual findings by the district court as clearly erroneous. These findings are sufficient to support the district court's conclusion that these sergeants are exempt executives because they indicate that the sergeants' primary duty is managerial.

12. Prisoner Processing Sergeant

The prisoner processing unit coordinates the arrest, custody, paperwork, administration and release of detained or incarcerated individuals. One sergeant serves

as Deputy Commander, with the primary responsibility of overseeing nine officers, two turnnkeys, and over eighty civilians; plaintiffs stipulate that his position is exempt. Five more sergeants serve as platoon leaders. These six sergeants' duties involve managing and overseeing the smooth operation of the unit. The court found that each sergeant has overall operational responsibility and accountability for prisoner care.

Evidence at trial indicated that the platoon sergeants prepare duty rosters and time sheets, and review arrest registers. Appellants' App. at 176. The platoon sergeant supervises and coordinates the activities of subordinates, arrest processing and release of prisoners.

We do not believe that any of the district court's factual findings are clearly erroneous. We believe these findings are more than sufficient to determine that the executive exemption applies.

13. Identification Section Sergeant

Sergeants in the identification section oversee the latent fingerprint unit and the evidence technician unit. The district court found that their principal duty is to coordinate the smooth and timely delivery of identification requests made to the unit, not to actually fingerprint people or process identification requests. Based upon our review of plaintiffs' brief, we do not believe they alleged error with respect to these findings. These findings demonstrate that the identification sergeants' primary duty is management.

14. Academy Sergeants

Two sergeants are assigned to the academy: one is in charge of basic training and the armory; the other conducts in-service training and is responsible for the Fitness Center. The district court found that five officers report to the basic training/armory sergeant and that four civil-

ians and one officer report to the in-service sergeant. The court found that the primary duties of the basic training/armory sergeant are to develop programs, create schedules, maintain records for officer basic training, and to control the armory's arms used for firearms training. The court found that the in-service sergeant's primary duty is "to implement training and fitness programs for current police personnel as implemented and managed through the civilians and officers that report to this position."

Plaintiffs do not contend that any of the factual findings concerning the in-service/fitness center sergeant are clearly erroneous. Although plaintiffs concede that the basic training/armory sergeant is primarily responsible for ensuring the smooth running of the armory, they argue he should be nonexempt because he spends over 75% of his time working as an arms expert, technician and instructor. As noted previously, the regulations do not embrace a strict temporal analysis to determine if the executive exemption applies; time is only one factor in the mix. This sergeant's managerial duties are more important than his other duties because he is responsible for the overall operation of the armory. The development of programs and schedules by this sergeant require the exercise of discretion. As noted previously, the sergeants' pay is markedly higher than a patrol officers. Based upon these factors, the district court correctly determined that the armory sergeants are exempt from the FLSA as executives.

15. Evidence Technician Unit Sergeant

The court found that the evidence technician unit is a component of the identification section. The unit is comprised of twelve specialists reporting to one sergeant. The court found that the specialists are responsible for responding to crime scenes and gathering physical and other types of evidence. The court found that the sergeant's primary duty is to act as a manager and direct the inflow of requests and for responses to crime scenes, to assign personnel within the unit, and caseload administration. Plaintiffs do not argue that any of these factual findings are erroneous. These factual findings are more than sufficient to establish that this sergeant's primary duty is management.

16. Traffic Safety Division Sergeants

The district court found that traffic safety sergeants were partially nonexempt from the FLSA for the portion of time that they worked as accident reconstruction specialists. The court noted that the unit has four sergeants who report to a lieutenant. The sergeants direct the activities of Platoons A and B, each of which contain nine patrol officers; Platoon C, the night watch platoon with two officers; and the motorcycle unit. The sergeant in charge of the motorcycle unit is also responsible for the accident reconstruction team, which has eight officers. The court found that all of the traffic safety sergeants are required to serve relief duty. Relief duty entails rotating their responsibilities and substituting for reasons of illness or vacation. The court found that the sergeants managed the respective components of the traffic safety unit and administer the diverse traffic control activities of the officers under their command.

The court found that the primary duty of sergeants when working as accident reconstruction specialists is to perform the actual work of measurement, analysis and calibration necessary to reenact vehicular accidents involving criminal charges. The court further found that this sergeant is on call on a twenty-four-hour basis, including personal and vacation time, to perform accident reconstruction work. The court found that when any sergeant was performing these duties, he was not an executive exempt from the FLSA's provisions, and entitled to overtime compensation.

The board appeals the district court's decision that these sergeants are partially nonexempt from the provisions of the FLSA. The board argues that an employee is either exempt or nonexempt from the provisions of the FLSA. We agree. The FLSA provides that "an employee employed in a bona fide executive, administrative, or administrative capacity" is exempt from its provisions. 29 U.S.C. § 213(a)(1). Furthermore, as noted above, determining whether or not an employee falls under the executive exemption requires an analysis of whether his primary duty is management. If so, the employee is exempt as an executive; if not, the employee is nonexempt and entitled to overtime compensation. This test provides an all or nothing method for determining whether an employee who performs some management and some nonmanagement job duties is entitled to overtime compensation. The parties have not cited, and we are not aware of, any case which holds that an employee is entitled to overtime compensation under the FLSA for those portions of job duties that are not exempt. Accordingly, the district court erred by determining that the traffic unit sergeants are partially exempt from the provisions of the FLSA.

Our conclusion that the regulations prevent an employee from being partially exempt as an executive is bolstered by the FLSA's explicit grant of a partial exemption to public agencies, with respect to certain law enforcement and fire protection activities. 29 U.S.C. § 207(a)(1). Under section 7(k) of the FLSA, which is not applicable in this case, police officers are entitled to time and one-half pay only after they have worked approximately forty-three hours in a seven-day work week. *Avery v. Talladega, Ala.*, 24 F.3d 1337, 1342 (11th Cir. 1994). This section indicates that Congress will grant a partial exemption if it so desires, and we will not infer a partial exemption that appears to contradict the regulations.

The board argues that a remand is unnecessary, because it is evident from the district court's factual findings that the traffic unit sergeants' primary duty is management. We agree. The district court found that the primary duty of the traffic unit sergeants was to manage each of the component parts of traffic safety and to administer the diverse traffic control activities of the officers under their command. Plaintiffs do not challenge this finding as clearly erroneous. Furthermore, this finding is in keeping with the sergeants' duties as delineated in the police manual. The police manual lists the traffic safety sergeants' primary duty as the supervision and coordination of officers engaged in enforcing traffic regulations, providing assistance to motorists and controlling traffic. Appellees' App. at 343. Typical duties, as listed in the police manual, are: (1) supervision of officers assigned to the unit; (2) reviewing reports and arrests made by subordinate officers; (3) assigning officers as needed to direct traffic at incidents of fires, disasters and major accidents; (4) informing the public, media and other members of the department with regard to traffic ordinances and statutes; (5) preparing administrative reports; (6) making various public speaking engagements to community organizations; and (7) performing any related duties as required. *Id.*

Under these circumstances, we believe that the traffic safety sergeants' primary duty was management although the sergeant in charge of the motorcycle platoon and accident reconstruction spent some portion of his time performing nonexempt work. The traffic safety sergeants had a higher salary range than their subordinates, although their actual salary may be lower depending upon experience. Viewing the traffic safety sergeants' responsibilities as set forth in the police manual indicates that their primary duties are managerial, as the district court found. Accordingly, the traffic safety sergeants are exempt executives, and the district court erred when it determined that the sergeants were partially nonexempt for the portion

of time that they spent performing accident reconstruction work. *See Shockley*, 997 F.2d at 26-27.

17. Bomb and Arson Sergeant

The bomb and arson unit consists of one sergeant who is in charge of six officers. The district court found that the key responsibility of this unit is responding to explosive or arson threats, and investigating explosions and arson fires in coordination with other local, state or federal agencies. The district court noted that certification is required to handle explosives and that four officers in the unit, including the sergeant, are certified. The district court found that in addition to the sergeant's supervisory responsibilities, he must also directly respond to incidents. The court found that while on calls, the sergeant serves in a nonexempt capacity, and is therefore only partially exempt from the FLSA.

The board appeals the district court's determination that the bomb and arson sergeant is partially nonexempt from the FLSA when responding to calls because an employee must be either exempt or nonexempt. We previously addressed this issue with respect to the traffic safety sergeants. We hold that the district court erred in determining that the bomb and arson sergeant may be partially exempt from the FLSA for the same reasons that it erred in holding the traffic safety sergeants partially exempt, which we need not reiterate.

Again, the board argues that a remand is unnecessary because the district court found that the primary duty of the bomb and arson sergeant was management. We agree. The district court found that the bomb and arson sergeant is in charge of the six officers within the unit and, in addition to his supervisory functions, he also performs nonexempt work while on calls. The sergeant does not carry his own caseload. Appellees' App. at 137. He provides periodic training to his detectives, evaluates their performance and initiates any discipline or reward of good behavior as needed. *Id.* at 139-40. The bomb and arson sergeant spends a high percentage of his time in the office. *Id.* at 141. Accordingly, since this sergeant's primary duty was management, he is an executive exempt from the provisions of the FLSA.

C. Administrative Exemption

We now consider whether the district court properly concluded that three categories of sergeants were exempt from the provisions of the FLSA as administrators. Because the sergeants are salaried employees earning at least $250 per week, this question turns on whether both prongs of the "short test" [11] apply. Under the regulations,

[11] If the sergeants earned less than $250 per week, the board would have to satisfy a more stringent test to establish that plaintiffs were exempt as administrators. The elements of the long test are:

> The term *employee employed in a bona fide . . . administrative . . . capacity* in section 13(a)(1) of the Act shall mean any employee:
>
> (a) Whose primary duty consists of either:
>
> (1) The performance of office or nonmanual work directly related to management policies or general business operations of his employer or his employer's customers, or
>
> (2) The performance of functions in the administration of a school system, or educational establishment or institution, or of a department or subdivision thereof, in work directly related to the academic instruction or training carried on therein; and
>
> (b) Who customarily and regularly exercises discretion and independent judgment; and
>
> (c)(1) Who regularly and directly assists a proprietor, or an employee employed in a bona fide executive or administrative capacity (as such terms are defined in the regulations of this subpart), or
>
> (2) Who performs under only general supervision work along specialized or technical lines requiring special training, experience, or knowledge, or

an employee is an exempt administrator if his "primary duty consists of the performance of [office or nonmanual work directly related to management policies or general business operations of his employer], which includes work requiring the exercise of discretion and independent judgment." *Shockley*, 997 F.2d at 28 (citing 29 C.F.R. § 541.2(e)). The principles utilized in determining whether an employee's primary duty is management also apply to determine whether an employee's primary duty is administration, albeit focused on administrative rather than managerial duties. *Id.* (citing 29 C.F.R. § 541.206 (b)). In other words, under the short test, determining whether an employee is employed in an administrative capacity "requires proof either that the employee spends half his time on administrative duties or that administrative duties have special significance relative to the employee's other duties." *Id.* Administrative duties include "advising the management, planning, negotiating, representing the company, purchasing, promoting sales, and business research and control." 29 C.F.R. § 541.205(b).

The district court found that each of the three categories of sergeants claimed by the department to be exempt administrators admitted accountability for at least

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(3) Who executes under only general supervision special assignments and tasks; and

(d) Who does not devote more than 20 percent, or, in the case of an employee of a retail or service establishment who does not devote as much as 40 percent, of his hours worked in the workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (c) of this section; and

(e)(1) Who is compensated for his services on a salary or fee basis at a rate of not less than $155 per week ($130 per week, if employed by other than the Federal Government in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities.

29 C.F.R. § 541.2(a)-(e)(1).

two or more of the administrative duties outlined in the regulations. Accordingly, in its findings of fact, the court focused only upon the primary duty of each of the separate categories. We now examine each category in turn.

1. Job Performance Section Sergeant

The court found that one sergeant manages the job performance section. The primary responsibility of the job performance section is the identification of, and provision of, counseling or other support services for employees who have administrative or duty related problems. This section provides a "first line response" for officers who may be showing signs of stress or other job related impairments. The court found that the sergeant was exempt as an administrator "due to the almost quasi-professional role that the sergeant undertakes with respect to evaluating and resolving employee problems." Addendum at 34. After examining the plaintiffs' brief, we find no specific challenge to these factual findings. These findings are more than sufficient to establish that this sergeant is exempt as an administrator.

2. Internal Affairs Division Sergeant

The Internal Affairs Division (IAD) helps maintain the department's integrity by ensuring, through investigation, that it is free of criminal conduct or other types of illegal or ethical violations. The court found that the unit is staffed with one captain, who serves as commander, fourteen sergeants and one civilian. The court found that one sergeant serves as Deputy Commander, and is mainly responsible for assigning the caseload.

The court found that sergeants were selected to staff the IAD because their experience and rank of sergeant confers a level of authority allowing their job performance to be relatively free from resistance. The court found that IAD sergeants are selected based upon their superior oral and written communication skills, with demonstrated

proficiency in comprehension of department regulations and procedures. The court further found that the captain selects officers "who can think on their feet" and upon whom he can rely for advisement. The court specifically found that IAD sergeants have more discretion than other sergeants with almost complete discretion to determine whether to proceed upon any case they receive. If the sergeant decides to proceed, he exercises independent judgment to determine the violation or charges to be filed against the offending officer. The court concluded that IAD sergeants are administratively exempt because they perform work ensuring that the department operates in accordance with its stated policy goals and objectives.

Plaintiffs do not challege any of the district court's factual findings. Rather, they argue that because the IAD sergeants actually performed investigations, they cannot be exempt as administrators. Plaintiffs refer us to *Reich v. New York*, 3 F.3d 581 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1187 (1994), in support of this argument. In *Reich*, the Second Circuit held that police officers were not exempt administrators if they were involved in "production" activities of the police department. *Id.* at 587. The *Reich* court held that conducting investigations was production work outside of the administrative exemption. *Id.* The police officers in *Reich* performed typical law enforcement activities: investigation of felonies and major misdemeanors. *Id.* at 585. The IAD sergeants, however, do not perform typical law enforcement activities; they perform internal investigations to ensure that the officers within the department are complying with its policies. Thus, *Reich* is inapposite because IAD sergeants are not involved in typical law enforcement activities.

In *Shockley*, the Fourth Circuit held that the "Ethics and Standards Leiutenant," who performed the same job duties as the IAD sergeants, was an exempt administrator. 997 F.2d at 28. The *Shockley* court relied on regulations that provide that an employee is an administrator if he

"makes analyses of data and draws conclusions which are important to the determination of . . . other policy, clearly he is dong work directly related to management policies or general business operations." *Id.* (quoting 29 C.F.R. § 541.205(c)(3)). Similar to the Ethics and Standards Lieutenant in *Shockley*, the IAD sergeants spend all of their time accumulating and analyzing data and making recommendations that shape the department's policy with respect to internal discipline. Under these circumstances, the district court correctly determined that the IAD sergeants were exempt administrators. *Shockley*, 997 F.2d at 28.

3. Quality Control Section Sergeant

The quality control section is commanded by a captain, who has three sergeants assigned to the unit. Sergeants were selected to staff the unit because they are more experienced in coordinating and managing the activity of subordinates and they are able to determine whether officers are maintaining the standards of professionalism set forth in the department's policies and procedures. The court found that the primary duty of the quality control sergeants is to ensure that department personnel are functioning in a manner consistent with department policies. Thus, the district court concluded that they were exempt as administrators.

Plaintiffs inform us that the quality control sergeants inspect the bureaus to make sure they are adequately equipped, that their books comply with the department manual, and that they then write a factual report. Plaintiffs argue that the quality control sergeants do not exercise independent judgment and discretion adequate to fall under the administrative exemption. However, evidence at trial revealed that the sergeants were in the process of (1) reviewing the duties of the job performance unit to determine if that unit can be absorbed into the quality control unit, and (2) evaluating a complaint

that the night shift staff of the Police Incident Reporting System is overworked. The sergeants who work on each study will make a recommendation on it. Appellees' App. at 231-32. This type of analysis necessarily entails the exercise of independent judgment and discretion. Accordingly, the district court correctly determined that the quality control sergeants are exempt administrators.

D. Combination Exemption

The district court determined that the special assignments sergeant was exempt from the provisions of the FLSA under a combination of the executive and administrative exemptions. However, the district court made no factual findings with respect to the amount of time this sergeant spent on nonexempt duties. The regulations allow combining the exempt work from one section to the exempt work of another section. 29 C.F.R. § 541.600 (a). Thus, an employee whose primary duty is neither management nor administration may fall under a combination exemption based upon his administrative and management responsibilities. *Shockley*, 997 F.2d at 29. "In combination exemptions, however, the employee must meet the stricter of the requirements on salary and nonexempt work." *Id.* (internal quotations and citation omitted). In other words, the employer must show that the employee falls within a combination of the long tests, and cannot rely on a combination of the short tests. This means that an employee will qualify for a combination exemption only if he does not devote more than 20% of his time to nonexempt work. 29 C.F.R. §§ 541.1(e), 541.2(d). Because the district court made no factual findings regarding the amount of time the special assignments sergeant spent on exempt and nonexempt job duties, it is impossible to determine whether or not the combination exemption applies.

We hold, however, based upon the factual findings the district court made, that the special assignments sergeant

is an exempt executive under the FLSA. The special assignments unit assists in the management and coordination of officers assigned to various federal agencies, city of St. Louis agencies, and the mayor's office. The sergeant is in charge of fifteen officers. The court found that the sergeant's primary duty is managing his subordinates, with regard to expediting essentially administrative and liaison tasks. These findings are more than sufficient to conclude that the special assignments sergeant's primary duty is management. Thus, he too is exempt from the FLSA as an executive.

III. CONCLUSION

For the foregoing reasons, the judgment of the district court is affirmed with respect to the isues raised in the appeal and reversed with respect to the issue raised in the cross-appeal.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B

[Filed Apr. 22, 1994]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Cause No. 88-2071-C (4)

FRANCIS B. AUER, *et al.*,
Plaintiffs,

v.

ANNE MARIE CLARKE, President, St. Louis Board of Police Commissioners, etc., *et al.*,
Defendants.

FINDINGS AND CONCLUSIONS OF LAW

Plaintiff Francis Bernard Auer, one of many similarly situated[1] St. Louis police sergeants, brought suit against the St. Louis Board of Police Commissioners under the

[1] Although Federal Rule of Civil Procedure 23 generally governs class actions in federal court, that rule is not applicable to FLSA claims. The FLSA has its own class action provision contained in 29 U.S.C. § 216(b) which requires plaintiffs to "opt in" to inclusion into the class as opposed to the F.R.C.P. 23(c)(2) provision for plaintiffs to "opt out" if they want to be excluded from a damage claim. Unfortunately, the FLSA does not contain any provisions covering class certification or notice, and relies on receipt by the court of consent forms from potential class members. In view of this situation, the court allowed receipt up to trial of bona fide consent forms in order to identify parties to the instant claim and thereby satisfy the FLSA's requirement regarding payment of reasonable attorney fees and costs. Future plaintiffs who wish to join would be required to initiate an independent suit, but would be able to rely on the court's findings and conclusions contained herein.

Fair Labor Standards Act of 1938 (FLSA), as amended, 29 U.S.C. § 201 *et seq.* Plaintiff contends that defendant Anne Marie Clarke, in her official capacity as successor president of the St. Louis Police Board,[2] violated the record keeping and overtime payment requirements of the FLSA by failing to compensate alleged nonexempt police sergeants for hours worked in excess of the standard 171 hours per month.

Defendant responded that St. Louis police sergeants, by Missouri state statute and as related to their responsibilities, were exempt from the FLSA as "executive" and "administrative" employees (or some combination thereof) pursuant to 29 U.S.C. § 213(a)(1).[3] According to defendants, since 1978 St. Louis police sergeants have

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[2] On October 4, 1993, the court granted plaintiff's motion to substitute defendant Police Board presidents in recognition of the ongoing changes in composition and leadership of the St. Louis Police Board. The Court herein *sua sponte* substitutes Anne Marie Clarke for James F. Conway. Plaintiff has not, however, named the City of St. Louis or the State of Missouri as party defendants.

[3] [29 U.S.C.] § 213 *Exemptions*

(a) The provisions of section 206 (except subsection (d) in the case of paragraph (1) of this subsection) and section 207 of this title shall not apply with respect to—

(1) *any employee employed in a bona fide executive, administrative, or professional capacity* (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of subchapter II of chapter 5 of Title 5, except that an employee of a retail or service establishment shall not be excluded from the definition of employee employed in abona fide executive or administrative capacity because of the number of hours in his work week which he devotes to activities not directly related to the performance of executive or administrative activities, if less than 40 per centum of his hours worked in the work week are devoted to such activities) . . ." [emphasis added].

served and were always meant to serve as first level managers.

The Court denied plaintiffs and defendants' motions for summary judgment [4], and strongly encouraged the parties to settle. The parties, however, could not reach a mutually satisfactory agreement and the matter subsequently came to trial on September 15, 1993. The Court herein renders its decision.

HISTORICAL BACKGROUND

Congress enacted the Fair Labor Standards Act of 1938 as one of many remedies to the ills of the Great Depression. In order to get Americans back to work, Congress decided to fix the amount of hours in a work week and to make employers pay an overtime premium penalty for any labor performed by employees beyond an established 40 hour standard. The intended impact was to force employers to hire new workers (instead of overworking current ones) and thereby stimulate economic growth.

Over time, Congress and the courts continually interpreted coverage under the FLSA to be as fully encompassing as possible.[5] Compensation at the rate of time plus one-half times the hourly rate for hours worked in

[4] On October 30, 1991, the court granted defendants' motion for summary judgment and dismissed plaintiff Manuel Delgado finding that as a lieutenant his primary duties were managerial in nature which qualified him as an executive and therefore exempt within the meaning of the FLSA. Although the ruling was specific to Lieutenant Delgado, it was, in effect, determinative that all St. Louis police officers of the rank of lieutenant and above were exempt employees whereas their primary duty was to serve in a managerial capacity.

[5] *See, Arnold v. Ben Kanowsky*, 361 U.S. 388, 392 (1960). ("[E]xemptions are to be narrowly construed . . . and their application limited to those establishments plainly and unmistakably within their terms and spirit.")

excess of the standard 40 hours became the rule rather than the exception, and protected relatively weak and powerless workers from all forms of potential workplace abuse and exploitation.[6] Nonetheless, a key issue which arose was whether the FLSA's coverage extended to certain categories of federal, state, and local government workers.[7] In 1976, the Supreme Court decided that FLSA coverage did not include employees who worked in capacities of "traditional government functions" such as police protection, firefighting, sanitation, and mass transit, *National League of Cities v. Usery*, 426 U.S. 833 (1976). But less than 10 years later, the Supreme Court reversed itself and included these groups under the FLSA, *Garcia v. San Antonio Metropolitan Transit Authority, et al.*, 469 U.S. 528 (1985).

In the wake of the Supreme Court's ruling in *Garcia*, municipal and state governments became increasingly concerned about FLSA compensation for these groups. Due to the essential and emergency nature of the services that they provided, public health and safety employees could wield the potential for extremely powerful bargaining positions through the threat of strikes and economic holdouts. Government officials did not want to face the dire consequences that would ensue upon the public wel-

[6] *Fleming v. Hawkeye Pearl Button Company, et al.*, 113 F.2d 52, 56 (8th Cir. 1940). "The manifest declared purpose of the [FLSA] was to eradicate from interstate commerce the evils attendant upon low wages and long hours of service and industry. Accepting this as the declared purpose of the Act, exemptions would tend to defeat its purpose. The statute is remedial, with a humanitarian end in view. It is therefore entitled to a liberal construction."

[7] In 1974, Congress amended the definition of "employee" in the FLSA to include federal employees, 29 U.S.C. § 203(e). In addition, 29 U.S.C. § 216(b) which creates a private right of action for unpaid wages and liquidated damages was revised to include that "(a)ction to recover such liability may be maintained against any employer (*including a public agency*) in any Federal or State court of competent jurisdiction . . ." [emphasis added].

fare should these services be interrupted as the result of contract disputes. Nor could these officials meet the potential financial demands that would be imposed upon already strained budgets by ever increasing salaries and wages which would result from overtime payments to government workers required by *Garcia*. Consequently, a plethora of litigation was heard and reviewed by the courts in regard to the application of its holding to various public health and safety employees.

In response, Congress provided some relief in the form of special accommodations set forth in the Fair Labor Standards Amendments of 1985,[8] as well as in regulations proposed by the Department of Labor,[9] for employees who were not exempt (i.e., *nonexempt*) from receiving overtime compensation. These provisions required a certain amount of limited unpaid overtime by public safety employees to ensure that state and local governments were given a financial cushion that would enable them to afford services necessary for the public good. For example, as opposed to the normal maximum 160 hour limit set for private sector workers during a 28-day (four week) work period, firefighters were expected to work a standard 216 hours (later changed to 212 hours) and police were expected to work a standard 186 hours (later changed to 171 hours) before overtime compensation would become required. Also, unlike their private sector counterparts, government workers could be compensated

[8] 29 U.S.C. § 207(k)(a)(1), (2), and 29 U.S.C. § 207(o)(1), respectively, allowed extended pay periods for these workers prior to overtime pay provisions as well as payment in compensatory time in lieu of cash.

[9] 29 C.F.R. 541.6 provided that "separate treatment for different industries and for *different classes of employees* may be given consideration." [Emphasis added.] Additionally, the *Garcia* Court allowed a 12 month "window of opportunity" period from April 1985 to April 1986 for state and local governments to prepare for the impact of overtime pay on their budgets, and banned retroactive relief.

by time off in lieu of dollars to ensure overtime payment in a manner that eased the burden on government budgets.

But certain types of public safety employees were still *exempt* from all of the overtime compensation requirements of the FLSA. Notably, these were the people who served in executive, administrative, and professional capacities and who were compensated at greater levels for performing managerial and professional functions, as opposed to routine hourly labor. Fixed salary compensation for such exempt employees accounted for all of the work that they performed, regardless of the actual amount of hours spent to accomplish their tasks.

Many police departments are akin to military structures in their organization. Their quasi-military structure was developed to enable the police to respond effectively and rapidly to emergencies, to move quickly and decisively where force was required, and to generally set a tone of discipline and good order among the ranks. In most municipalities, police sergeants filled a role analogous to noncommissioned officers in the military ranks, having direct authority over rank and file "enlisted" type patrol officers as well as administrative, civilian and professional personnel. However, sergeants still received orders from and were directly accountable to the command authority of commissioned officers above.

Today, nuances in the amount of autonomous power that vests in sergeants varies among municipalities. Generally, larger cities rest less command power with sergeants due to a more centralized hierarchy of power within their organization structures. Smaller cities are able to allow sergeants more decentralized authority since public safety demands and total manpower are commensurately smaller and more easily managed. Basically, though, a municipality or other form of local or state government has fairly unrestricted latitude to shape and compensate a police force in a manner that satisfies its particular needs.

FLSA AND ST. LOUIS POLICE SERGEANTS

The challenge to this Court and many others has been to determine whether and when employees are eligible for overtime compensation under the FLSA. Particularly complex are court determinations of the FLSA's applicability to public safety employees against the historical backdrop of *National League of Cities* and *Garcia*. Therefore, a determination involving public safety employees' coverage under the FLSA "requires the 'drawing of lines' which in borderline cases sometimes appears arbitrary, but which nevertheless must be drawn on the basis of national policy, legislative history, and administrative practicalities as well as the particular facts of each individual case." *Batts v. Professional Building, Inc.*, 276 F. Supp. 356, 359 (1967).

A police department should be allowed to conduct its activities as free from federal government or court intervention as possible so long as it demonstrates a reasonable exercise of the discretion to appropriately manage its employees. As the St. Louis Chief of Police stated during trial, "We don't expect Sergeants to get out on the street and make arrests and issue tickets, and any of the rest of that. A Sergeant's responsibility is to manage the activity of other officers subordinate to him in rank to do those [arrest and ticket issuing] functions." [10] Notwithstanding, the Court has a duty to review the facts of this matter under the auspices of established legal standards and tests in addition to the evidence and testimony presented at trial to determine the validity of plaintiffs' claims.

Thus, this Court must review application of the FLSA to certain St. Louis Police Department sergeants for a determination of their exempt status in a manner that does no more than what is necessary to accomplish en-

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[10] Testimony of Clarence Harmon Jr., Trial Transcript at 122, September 17, 1993.

forcement of the spirit and letter of the FLSA while avoiding micromanagement of municipal activities. Because police sergeants lead "a hybrid existence" divided between both the command and patrol ranks, the Court finds it instructive that the Missouri legislature expressly and purposely approved the organizational philosophy and subsequent structure of police departments within the cities under its jurisdiction.

Within the State of Missouri the legislature has provided for distinct differences between the police department structure in Kansas City and St. Louis. The statutory overtime compensation provision for *Kansas City* states in pertinent part within the 1993 Revised Statutes of Missouri (MO. REV. STAT.):

> The chief of police, subject to the approval of the board, shall establish the total regular working hours for all police department employees, and *the board has the power, upon recommendation of the chief, to pay additional compensation for all hours of service rendered in excess of the established regular working period*, but the rate of overtime compensation shall not exceed one and one-half times the regular hourly rate of pay to which each member shall normally be entitled. No credit shall be given nor deductions made from payments for overtime for the purpose of retirement benefits.

MO. REV. STAT. § 84.510(5) (emphasis added).

In contrast, the *St. Louis* statutory provision specifically eliminates overtime compensation for the rank of sergeant and above inasmuch as it states:

> Each of the above-mentioned salaries shall be payable in biweekly installments. Each officer of police and patrolman whose regular assignment requires non-uniformed attire may receive, in addition to his salary, an allowance not to exceed three hundred

> sixty dollars per annum payable biweekly. *No additional compensation or compensatory time off for overtime, court time, or standby court time shall be paid or allowed to any officer of the rank of sergeant or above.*

Mo. Rev. Stat. § 84.160(4) (emphasis added). *See, infra,* fn. 12.

The Court assumes that Missouri's elected representatives took care and gave great contemplation when designing a St. Louis Police Department organizational structure that would best serve a particular constituency. When a federal court reviews Congressional legislation it does not lightly set aside the considered judgment of a coordinate branch. *See, Metro Broadcasting, Inc. v. FCC,* 497 U.S. 547, 605 (1990) (O'Connor dissenting). When a federal court reviews a state statutory scheme it is equally reluctant to second guess a state legislature's decisions, and even more hesitant to overturn its statutes as plaintiffs have petitioned the Court to do.[11]

Accordingly, the Court notes with deference that in May 1977, seven years prior to *Garcia,* the 79th General Assembly of the State of Missouri met and proposed to repeal and reenact certain sections of the Revised Statutes of Missouri including Mo. Rev. Stat. § 84.160 which determined compensation for St. Louis police officers. In its place, the Missouri legislature installed Mo. Rev.

[11] In their second amended complaint plaintiffs stated, "RsMO [sic] Section 84.160(5) is unconstitutional in that it violates Article 6, clause 2 of the United States Constitution wherein the U.S. Constitution and the Laws of the United States shall be the Supreme Law of the land. More particularly, the State cannot enact a law exempting Sergeants from overtime compensation contrary to the provisions of the FLSA." Plaintiffs' sixth prayer for relief was to "[d]eclare RsMO [sic] Section 84.160 unconstitutional."

Stat. § 84.160.1,[12] and § 84.160.7.[13] These statutes became the law in Missouri by 1979 and remained intact until 1992 when the Missouri legislature replaced Mo. Rev. Stat. § 84.160.7 with Mo. Rev. Stat. § 84.160.3,[14], but nonetheless continued to expressly ban overtime compensation for St. Louis police sergeants. In 1993, the relevant statutory authority became Mo. Rev. Stat. § 84.160.4 but the language remained identical to the 1992 language.

The Court found no dispositive evidence of legislative intent with regard to whether the 1979 eight per cent salary increase for St. Louis police sergeants was meant to confer managerial responsibilities upon them. The legislative record only indicates that the increase was meant to compensate sergeants for overtime pay that they would no longer receive. However, there is a strong inference that a sergeant's level of authority and commensurate compensation was legislatively and professionally meant to be markedly different from that of rank and file officers.

For example, in 1993, the Missouri legislature set sergeants' beginning salaries at $39,192 through June, 1994,

[12] Mo. Rev. Stat. § 84.160.1: [E]ach sergeant who has served in the rank of sergeant for six years or more shall receive . . . seventeen thousand seven hundred and forty dollars per annum; each sergeant during the first five years that [s]he serves in the rank of sergeant shall receive . . . seventeen thousand one hundred ninety four dollars per annum. *Laws of Missouri,* H.C.S.S.C.S. Senate Bill No. 508, pp. 227-233, Adopted March 23, 1978.

[13] Mo. Rev. Stat. § 84.160.7: *In lieu of compensatory time off or payments for overtime hours,* all commissioned officers of the rank of . . . *sergeant and above* shall receive an additional eight percent of the compensation established in Subsection 1 . . . including the chief of police [emphasis added]. *Id.*

[14] Mo. Rev. Stat. § 84.160.3: "No additional compensation or compensatory time off for overtime, court time, or standby court time shall be paid or allowed to any officer of the *rank of sergeant* or above." [Emphasis added.]

which is $16,360 (42%) greater than the lowest ranked new Turnkey Officer who earns $22,832; and $13,388 (34%) greater than a starting Patrol Officer who earns $25,804. Notably, over a one year period, a newly hired St. Louis police Turnkey would need to generate over 80 hours of overtime per month, and a freshmen St. Louis Patrol Officer would need to generate nearly 60 hours of overtime per month, in order to close the salary gap between either position, respectively, and that of a starting St. Louis Police Sergeant.[15]

In response to the Court's inquiry during oral arguments conducted on December 10, 1993, plaintiffs' counsel responded that patrol officers who seek a promotion to the rank of sergeant must enter into a "highly competitive" quest. They must make a conscious decision to forsake the potential for routine overtime pay.[16] They must work and study hard on their own time and beyond their routine duties to prepare for and successfully complete a battery of difficult examinations. They must patiently wait for promotional opportunities to arise as rotational openings for sergeants positions are only periodically posted. And they are keenly aware that with extremely rare exception any future career opportunities for senior command must be preceded by a tour of duty as a sergeant.

[15] The court obtained these data from the salary matrix charts contained in MO. REV. STAT. § 84.160.2 (1993). Annualizing the required 171 hours per month yields 2,052 hours per year. By dividing each respective salary by these total annual required hours, it is derived that a new Turnkey earns $11.13 per hour regular time and $16.70 overtime pay (i.e., 1.5 x $11.13). Conjointly, a new Patrol Officer earns $12.58 per hour regular pay and $18.87 per hour overtime (i.e., 1.5 x $12.58). The final calculation simply involves dividing the difference in pay between each respective position and that of a beginning Sergeant by the overtime rate:

A. *Turnkey*: $16,360/$16.70 = 980 annual overtime hours
= 82 monthly overtime hours

B. *Patrol*: $13,388/$18.87 = 709 annual overtime hours
= 59 monthly overtime hours

The court would find it unnecessary to comment upon the compensation gap between sergeants and patrol personnel except that plaintiffs have made considerable mulch of the circumstance that patrol officers may in some instances earn more than sergeants. To achieve this result, a Patrol Officer would usually need to be extremely senior or work the near equivalent of one and one-half jobs. For example, utilizing the same above calculations, a five year veteran Patrol Officer would need to perform 25 hours per month of overtime to equal a beginning Sergeant's pay, and a 10 year veteran would need to work at least 20 monthly overtime hours. Thus, in the case of very junior police officers, the amount of overtime required to "catch up" with a Sergeant's pay would likely be unfeasible, impracticable, and disallowed.

It must be recognized, then, that a dual career path exists within the St. Louis Police Department. A police officer is free to choose to remain on the beat with little managerial or supervisory responsibility but with an increase in the potential for obtaining more overtime pay opportunities. Alternatively, a police officer may choose to pursue command career opportunities which must necessarily entail serving a tour of duty as a sergeant. However, upon achieving the rank of sergeant, limitations will arise with respect to the amount and type of overtime or other opportunities that will exist for a police officer to generate additional income. Apparently, the tradeoff was meant by the Missouri legislature to be addressed by a significant increase in salary.

APPLICATION OF THE FLSA

The first issue the Court must address is the semantic conflict over the interchangeability between supervision and management. Plaintiffs concede that supervisory functions are part of management, but caution that super-

[16] Sergeants may, however, generate additional income through government grants as well as through approved outside employment in such areas as security and personal protection.

vision is not equivalent to management. Plaintiffs thereafter rely heavily upon the characterization of police sergeants as "working supervisors" who stand side by side with patrol officers conducting the same routine activities with the mere additional responsibility of occasionally showing officers how particular tasks are completed. As working supervisors sergeants are meant to and, in fact, are doing the same thing as officers subordinate to them. Following this logic plaintiffs urge the Court to conclude that sergeants should receive overtime pay since they are basically doing the same things as patrol officers.

Defendants submit that if there is any relevant distinction between management and supervision, it is a distinction with only trivial import to the instant matter. Alternatively, defendants cite numerous examples of sergeants' lack of statistical productivity [17] as a benchmark measure that a sergeant's primary duty is to manage, which is a role incompatible with achieving statistical laurels. Defendants contend that since a sergeant's performance is measured not by the amount of patrol type statistics he or she directly compiles, but rather by the amount of productivity that is generated by the officers who report to them, a sergeant's poor statistical performance may well be a leading indicator of the predominance of his or her role as a manager.

Management is not supervision. Management does encompass supervision. In their customary usage, the ultimate reconciliation between the two is one of the *degree* of control, authority, and autonomy exercised by the person in charge to basically get subordinates to accomplish the tasks which achieve the goals that make organiza-

[17] Defendants submitted Exhibits AA through GG, St. Louis Police Department Commission Activity Report from 1987 through 1993, to show the disparity of performance in routine patrol type activities (e.g., number of arrests, traffic violation citations) between sergeants and patrol officers.

tional productivity optimally successful. The Eighth Circuit's holding in *Murray v. Stuckey*, 939 F.2d 614 (8th Cir. 1991), is dispositive on this matter. Absent and even despite a showing of the amount of time spent on exercising particular responsibilities, the sum total of the type of responsibilities exercised and the degree of autonomy, discretion, and independent judgment allowed in exercising them is the linchpin for determining whether an employee is performing in a managerial capacity.[18]

Rank, title, or position descriptions, *per se*, or the amount of time spent expediting particular tasks or duties are not dispositive indicia of management. *Id.* at 618. What the person is intended to do and whether the person is actually doing it "based on all the facts in a particular case," *id.*, is what constitutes primary duty. In order to reach a determination of managership as primary duty, this Court must apply the four benchmark measures relied upon by the Eighth Circuit in *Stuckey's*, as set forth in C.F.R. § 541.103 and cited by both parties, which are:

1. The relative importance of the managerial duties as compared with other types of duties;
2. The frequency with which the employee exercises discretionary powers;
3. The employee's relative freedom from supervision;
4. The relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work performed by the supervisor.

[18] Conducting an entire orchestra is managerial. The maestro must coodinate all sections and particular instruments within sections to successfully accomplish playing the score. Among the conductor's managerial responsibilities lie supervisory tasks. For example, showing the string section how its part fits into the arrangement is supervisory. Appraising a soloist's performance would be supervisory.

Defendant Police Board acknowledged that it carried the burden of proof when claiming exemption from the FLSA's overtime and record keeping requirements. The parties agreed that in light of application of the "short test," the principal issue to be settled was whether the primary duty of St. Louis police sergeants is management.[19] The parties subsequently stipulated to 20 executive positions, three administrative positions, and one "combined" position—a total of 24 positions [20]—as those meriting review. The Court reviewed all disputed police sergeant positions against the primary duty test delineated in the four standards set forth in 29 C.F.R. § 541.103. The Court also considered each of these positions against the *Stuckey's* criteria as well as the totality of evidence and testimony presented at trial. Accordingly, the Court found plaintiff's argument persuasive in only two St. Louis Police Department sergeant positions which it found to be partially nonexempt from the overtime pay and record keeping requirements of the FLSA.

A. Executive Exemptions

"An employee may qualify for the executive exemption if the employee meets both the 'duties' and salary requirements set forth in 29 C.F.R. § 541.1 (a)-(f)." *McDonnel v. City of Omaha*, slip op. No. 92-3073 (8th Cir. 1993). The regulation gives examples of duties considered managerial which include training others; appraising employee performance, productivity and efficiency; recommending changes in job status; maintaining records;

[19] With respect to plaintiff sergeants, the court upheld the application of the "short test", 29 C.F.R. § 541.1(f), to assess their claims inasmuch as all plaintiff sergeants (a) earned over $250 per week, (b) were responsible for the work of two or more employees, and (c) questioned whether their primary duty was management.

[20] *See, infra*, fn. 21 and Joint Stipulation of Uncontested Facts at 3-4.

setting hours; apportioning work; handling grievances; and meting out discipline when necessary.

During trial, all sergeants now declared by the Court to fill exempt executive positions admitted accountability for at least two or more of these duties as they pertained to their job descriptions and their work activity. Inasmuch as all sergeants exempt under the FLSA's executive provision therefore performed some managerial duties, and the amount of time spent conducting those duties is irrelevant in the Eighth Circuit as long as the primary duty is management, the Court focused solely upon examining the primary duty of each disputed position in order to reach the following findings and conclusions:

1. *Precinct Sergeants* (Exempt)

Captains are in command of districts. Lieutenants command platoons within these various districts. Sergeants command the precincts within these platoons. According to testimony, about 120 precinct sergeants are currently employed in the St. Louis Police Department. Each precinct within the three Area Stations [21] requires daily patrol, and the sergeant must be aware of all activity that occurs within his precinct. The primary duty of the sergeants is to oversee the activity of patrol officers assigned to his platoon. They must demonstrate management, direction and the ability to coordinate activities of their subordinates and oversee their subordinates' conduct for proper interpretation and implementation of the rules and regulations.

Furthermore, precinct sergeants have a clear area of autonomy to move cars and personnel in a manner that optimally maintaains area safety. They are not primarily

[21] Previously there were nine different district stations; each district had its own separate building and station. Recently, the department has reorganized to an area station concept. (Trial transcript 9/15 at p. 93.)

performing routine tasks like arrests and ticketing. Instead, the precinct sergeants are required to take charge of crime scenes, direct activity, and ensure that their area is patrolled and secure. Precinct sergeants are required to participate in roll call to maintain order and decorum among the patrol troops and perform other duties which may add extra time to their shift. They may also have to remain on duty until all precinct officers are dismissed. However, such additional time is an essential part of a sergeant's leadership role and responsibilities. Rank and file patrol officers look to the sergeants for guidance and direction, while senior officers rely upon them for accountability and control of their areas and do not closely supervise their activities. Managerial duties far outweigh any others and are frequently and constantly exercised. As the Court has reviewed earlier, the salary differential to compensate precinct sergeants is markedly larger than their subordinates.

2. *Detective Sergeants* (Exempt)

In each of the three Area Stations a sergeant is assigned to its respective Detective Bureau to oversee the work of 13 to 16 detectives. Each of these sergeants reports to a lieutenant. Their principal duty is to manage the workload of detectives who report to them. Detectives who report to these sergeants must provide them with all information concerning police matters which comes to their attention. All interrogations, interviews and investigatory procedures conducted by detectives are subject to close scrutiny and review by the sergeants. These sergenats maintain a significant amount of latitude to ensure that the caseload is constantly moving. Although they may become directly involved in investigative matters, thier primary duty is to manage and oversee the entire caseload, and to report those results upward.

3. *Desk Sergeants* (Exempt)

The desk sergeant basically oversees the influx of calls and walk-in traffic and delegates others to respond. The desk sergeants' responsibilities include ensuring the satisfactory performance of both civilians and officers within the station house and they are accountable for ail assets and facilities within the station and prisoners in the hold-over. Area desk sergeants are in charge of all station operations. These include maintaining the desk "book" of arrests made and other station business such as complaints filed; prisoner processing, maintenance and control; forwarding police reports and other required forms and information; and training and guidance of other desk and booking personnel. These sergeants have a great deal of latitude in the authority and ongoing discretion that they must exercise to ensure that the station house operates according to procedures. The diverse nature of the type of situations which may arise and to which they must respond makes it necessary for them to exercise independent judgment and decision making to resolve these situations. Lieutenants do not look over their shoulders to make sure they are doing their job; they rely on them to handle situations and call them if there is a situation which needs approval from higher authority or may involve questions of law or policy. However, desk sergeants are free to manage their stations in the manner they see fit to get the job done with a minimum of supervision from above.

4. *Intelligence Sergeants* (Exempt)

This is an investigative unit that is responsible for gathering information on criminal activity within the St. Louis area. One sergeant is assigned to a gang crime unit, and two others are assigned to six-member detective teams. They collect data, prepare reports and analyses, brief police personnel on current crime situations, and also support investigations. Their work product is judged

on professionalism and effectiveness. They are minimally supervised, exercise near unfettered discretion, and enjoy a great deal of autonomy.

5. *Homicide Sergeants* (Exempt)

Homicide consists of eight sergeants who supervise teams of investigators. The principal charge of these sergeants is to oversee the investigations of reported killings. The primary duty of homicide sergeants is to manage a caseload and oversee investigation activity. Although they must perform some "hands on" investigative work, it is tangential to their principal charges.

6. *Auto Theft/Fraud Division* (Exempt)

Although sergeants assigned to this Crimes Against Property Unit may participate in investigations, the Court agrees with defendant that their principal duty is, like homicide, to manage the caseload and direct investigations of stolen autos and reports of fraudulent activity.

7. Narcotics/Vice Divisions (Exempt)[22]

The vice unit consists of a sergeant who manages eight officers, and the narcotics sergeant manages 16 officers. Again the primary duty of these sergeants is to manage each respective department as opposed to directly handling cases.

8. *Sex Crimes/Child Abuse* (Exempt)

Like homicide, narcotics, and vice, the sergeant's primary duty is to manage the unit workload and the eight officers who report to the unit.

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[22] For brevity, the Court has consolidated Narcotics and Vice categories as well as Mounted Patrol, Mobile Reserve and Canine Units. The Court has also isolated the Accident Reconstruction component of the Traffic Safety Division due to its highly specialized nature.

9. *Warrant/Fugitive Division* (Exempt)

The purpose of this unit is to maintain a liaison with the courts so as to ensure identification and arrest of persons with outstanding criminal or other violations of the law, and to recapture escaped prisoners. Ten officers are assigned to the unit to provide this law enforcement function. One sergeant acts as court liaison for scheduling. Another supervises the Fugitive section and has four officers who report to this position. Two other sergeants supervise the transport pool (nine officers reporting) and the Fugitive Apprehension Strike Team (FAST, four officers reporting). These sergeants' primary duty is management of this Division, although they may accompany their personnel on field activities. Even if they do go into the field, they exercise a great deal of management and discretion over those who report to them regarding how the capture or the transport will be organized.

10. *Public Affairs* (Exempt)

The public affairs sergeant is the deputy commander of the unit and is responsible for coordinating all media, community relations, and information dissemination functions. The staff of 10 officers reporting to the sergeant prepare the actual work product which the sergeant supervises. The sergeant's principal job is to interact directly with command authority regarding how these publicity requirements will be conducted and then translate them into staff assignments. As such, the sergeant serves primarily as a manager.

11. *Mounted Patrol/Mobile Reserve/Canine Units* (Exempt)

The primary purpose of the Mounted Patrol Unit is to patrol certain assigned and designated areas on horseback to ensure public safety. The typical duties of the sergeant in the unit are duty roster preparation, scheduling, reviewing patrol officer fittings and equestrian equipment,

and evaluating and appraising officer performance. The sergeant rarely directly partols areas on horseback. Instead, the sergeant uses a vehicle to cover as wide an area as possible to effectively oversee horseback operations. The unit is authorized for manpower of up to 10 officers who report to the sergeant who serves as the unit commander. The sergeant has fairly wide berth to make assignments of mounted patrols in various park areas of St. Louis. Decisions made by the sergeant are normally communicated to superior officers informationally as opposed to seeking permission. The primary duty of the sergeant in this unit is to manage, coordinate, and report the activities of the mounted patrol.

Mobile Reserve serves primarily as a force comprised of officers who deal with crime in highly concentrated areas at peak times. As such they usually work in the evening and late night hours, and each day they may have a different patrol assignment or function. The two sergeants in charge of Mobile Reserve have 10 officers reporting to each of them. The primary duty of these sergeants is to manage and coordinate the activities of the squads. Although assignment directives are received from above, these sergeants have latitude to implement them in a manner that they see is most effective utilizing the personnel and resources at their disposal.

The Canine Unit includes a street patrol function, a training and maintenance function, and a civilian who serves in a custodial capacity. One sergeant is in charge of all canine street operations, and another sergeant serves over the Training Center. A total of 15 officers are rotated throughout various duties on the street or in the Training Center. The principal duties of either sergeant involve overseeing operations, coordinating scheduling, assigning officer activities, and ensuring proper care and handling of the animals. The sergeants provide little in the way of direct patrol of the streets, and are accountable for all administrative and performance aspects

of the unit. The primary duty of these sergeants is management of the Canine Unit.

12. *Prisoner Processing* (Exempt)

Prisoner processing entails coordinating the arrest, custody, paperwork admininstration, and release of detained or incarcerated individuals. The division serves under the Bureau of Patrol Services. The sergeant serves as Deputy Commander of Prisoner Processing with the primary responsibility of overseeing the activities of nine officers, two turnkeys, and over 80 civilians. Five additional sergeants serve as platoon leaders over three eight-hour rotating shifts. In short, six sergeant work in Prisoner Processing with the express duties of managing and overseeing the smooth operation of the division. The primary duty of all of the sergeants is to manage the three shifts with overall operational responsibilities and accountability for prisoner care.

13. *Identification Section* (Exempt)

The Identification Unit is responsible for fingerprint processing, coordination, and identification. A civilian is in overall change of the unit, and a sergeant serves as Deputy Commander. Reporting directly to the Deputy Commander sergeant are three civilians and three officers who staff the Latent Fingerprint Unit. The Identification Unit, however, also employs a total complement of over 35 civilians and officers, including Evidence Technicians. The Evidence Technician Unit similarly reports to a sergeant, and consists of 12 sergeant specialists. The primary duty of both sergeants who oversee the Latent Fingerprint Unit and Evidence Technician Unit is management of each respective area. Their principal charge is not to actually fingerprint people or process identification requests, but to coordinate the smooth and timely delivery of such requests made to these units.

14. *Traffic Safety Division* (Partial Nonexempt)

The Traffic Safety Division is tasked with the enforcement of traffic regulations, providing motorist assistance, and traffic control. The Traffic Safety Division is under the command of a lieutenant. Four sergeants report to the lieutenant and direct the activities of its various components. These components include Platoons A and B which contain nine patrol officers each. Platoon C is the night watch platoon and contains only two officers. A third component is the motorcycle unit which serves under the same sergeant who is responsible for the Accident Reconstruction Team. Eight officers report to this component of Traffic Safety. Four of these officers are assigned to the grant for the Motor Carrier Safety Assistance Program (MCSAP).

All sergeants within Traffic Safety are required to serve relief duty. They must be able to rotate among responsibilities and substitute for reasons of illness or vacation. The primary duty of these sergeants is to manage each of the component parts of Traffic Safety. These duties are primarily managerial. The primary duty of these sergeants is to administer the multifarious traffic control activities of the officers under their command.

However, a Traffic Safety sergeant, while serving in the capacity of an accident reconstruction specialist as a primary duty, is nonexempt from the FLSA's requirements. The primary duty of this position is not management but performining the actual work of measurement, analysis and calibration necessary to reenact vehicle accidents that involve criminal charges. This individual may be called on a 24 hour basis, even on his/her personal time or vacation time, to perform these duties, and must be subject to the FLSA's overtime and record keeping requirements.

15. *Academy* (Exempt)

Two sergeants are assigned to the Academy. One sergeant is in charge of basic training and the Armory. The other sergeant conducts in-service training and is also responsible for the Fitness Center. Five officers report to the basic training/armory sergeant, and four civilians and one officer report to the In-Service sergeant. The major responsibilities of the basic training/armory sergeant are to develop programs, schedules, and maintain records for officer basic training, and to control the arms used for firearm training from the Armory. The primary duty of this sergeant is to implement these training programs through the officers below, a management function. Similarly, the in-service/fitness center sergeant's primary duty is to implement training and fitness programs for current police personnel as implemented and managed through the civilians and officers that report to this position.

16. *Evidence Technician Unit* (Exempt)

This unit is a component part of the Identification section. Reporting to one sergeant are 12 specialists who are responsible for responding to crime scenes and gathering physical and other types of evidence. The sergeant's primary duty as a manager is to direct the inflow of requests and for responses to crime scenes to assign personnel within the unit as well as the caseload administration.

17. *Bomb and Arson* (Partial Nonexempt)

A sergeant is in charge of six officers within the Bomb and Arson Unit. The key responsibility of this unit is to respond to calls of explosive or arson threats, and to investigate explosions and arson fires in coordination with other local, state, or federal agencies. In order to handle explosives, certification is required, and four people within the unit, including the sergeant, are certified. In addition to the sergeant's supervisory responsibilities, direct re-

sponse to incidents is required. While on these calls, the sergeant serves in a nonexempt capacity, and is subject to the overtime pay and record keeping requirements of the FLSA.

B. Administrative Exemptions

The analysis used to determine whether an employee's primary duty is administration is set forth in 29 C.F.R. § 541.206(b). An employee satisfies the short test for administrative employment if the employee's primary duty consists of performing office or nonmanual work directly related to management policies or general business operations, and includes work requiring the exercise of discretion and independent judgment. *Id.*, § 541.2(a)-(1). Administrative duties entail "work performed by so-called white collar employees engaged in . . . advising the management, planning, negotiating, representing, . . . purchasing, promoting, research and control." *Id.*, § 541.205(b).

Upon review of each disputed administrative position, the Court found during trial that all sergeants now declared by the Court to fill exempt administrative positions admitted accountability for at least two or more of these administrative duties as they pertained to their job descriptions and their work activity. Inasmuch as all sergeants exempt under the FLSA's administrative provision therefore performed some managerial duties, and the amount of time spent conducting those duties is irrelevant in the Eighth Circuit as long as the primary duty is management, the Court focused solely upon examining the primary duty of each disputed position in order to reach the following findings and conclusions.

1. *Job Performance Section* (Exempt)

Job Performance has as its primary responsibility identification of and providing counseling or other support services for those employees who have either administrative problems or duty related problems. Examples of the type of counseling problems that may be handled are officers who are involved in vehicular accidents, assaults, or arrest resists. It is a first line response for individuals who may be showing signs of stress or other job related impairments. One sergeant manages this unit which is administratively exempt due to the almost quasi-professional role that the sergeant undertakes with respect to evaluating and resolving employee problems.

2. *Internal Affairs Division* (Exempt)

The Internal Affairs Division (IAD) is charged with the responsibility of maintaining the integrity of the Police Department by ensuring through investigation that the department is free of criminal conduct and other types of legal or ethical violations. The IAD therefore investigates matters concerning Department employees who have been charged with or are suspected of procedural or criminal violations. The Division is comprised of one captain who serves as Commander, 14 sergeants, and one civilian. One sergeant serves as Deputy Commander of Internal Affairs and is mainly responsible for assigning the caseload.

Sergeants were selected to staff the IAD because of their experience and because the rank of sergeant confers a level of authority that enables them to perform their jobs relatively free from resistance. IAD sergeants are also selected because of their superior oral and written communication skills. They have demonstrated proficiency in their comprehension of Department regulations and procedures. The captain selects officers who can "think on their feet" and on whom he can rely for advisement.

IAD sergeants have more discretion than other sergeants. When they receive a case they have nearly complete discretion to decide whether or not to proceed on a complaint. Once the officer decides to proceed, he or she exercises independent judgment to determine the violation or charges to be filed against the offering officer.

Since IAD sergeants perform work that ensures that the department operates in accordance with stated policy goals and objectives, they are administratively exempt.

3. *Quality Control Section* (Exempt)

Quality Control, a relatively new section, is commanded by a Captain and three sergeants assigned to the unit. The rank of sergeant was selected to fill the three positions because sergeants were more experienced in coordinating and managing the activity of subordinates and for their ability to interpret whether or not officers are maintaining the standards of professionalism set forth in Department policies and procedures. The primary duty of the Quality Control sergeants is administrative in that they ensure that Department personnel are functioning in a manner consistent with Department policies.

C. Combination Exemptions

1. *Special Assignments* (Exempt)

Special Assignments was designed to assist in the management and coordination of officers assigned to various federal agencies, City of St. Louis agencies (e.g., Circuit Attorney's office), and the Mayor's office. It is comprised of 15 people, all of whom report to one sergeant. The primary duty of this sergeant is to manage the people below, but in regard to expediting essentially administrative and liaison tasks.

CONSTITUTIONAL CONFORMANCE

The Court finds plaintiffs' contentions that Mo. Rev. Stat. § 84.160 and specifically Mo. Rev. Stat. § 84.160 (5) should be preempted by the FLSA without merit. St. Louis police sergeants' primary duties fall within the executive and administartive exemptions set forth in 29 U.S.C. § 213 (a)(1). Where the Court has found exception to these FLSA exemptions, overtime relief is granted only when those sergeants are acting in the capacity of a nonexempt employee.

The primary duty of a Traffic Safety Division sergeant is to manage a unit within that division. However, that sergeant may be required to perform as an accident reconstruction specialist when called. The primary duty of the Bomb and Arson sergeant is to manage that Unit. However, due to the need for certification when responding to a threat call, that sergeant may be required to perform in the capacity of a nonexempt employee under those specific circumstances. Because such incident calls may be documented and logged with specificity, they may conform to the overtime and record keeping requirements of the FLSA.

When sergeants are acting in these nonexempt capacities, they must maintain a written record of their activity. Should such calls occur outside of their routine working schedule, overtime compensation is deserved. A log for such incident calls that occur within the sergeant's routine working schedule will also be maintained so that the sum total of those hours will be paid in addition to the sergeant's exempt salary. Payment may be received in cash, compensatory time, or some combination thereof,[23] but at the rate of a similarly situated nonexempt person, which is one and one-half times the nonexempt rate, when the sum total of these hours are in excess of the 171 hours allowed by the FLSA.

SO ORDERED.

Dated this 22nd day of April, 1994.

/s/ Clyde S. Cahill
CLYDE S. CAHILL
United States District Judge

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[23] Payment is to be made pursuant to Mo. Rev. Stat. § 84.160(7) which conforms to 29 U.S.C. § 207(o)(1), (2), and (3), and allows "compensation for authorized overtime . . . whenever the total accumulated time exceeds 40 hours. The accumulated 40 hours shall be taken as *compensatory time off* at the officer's discretion with approval of his supervisor." (Emphasis added.)

APPENDIX C

[Filed Apr. 22, 1994]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Cause No. 88-2071-C (4)

FRANCIS B. AUER, *et al.*,
Plaintiffs,

v.

ANNE MARIE CLARKE, President,
St. Louis Board of Police
Commissioners, etc., *et al.*,
Defendants.

ORDER

IT IS HEREBY ORDERED that judgment is entered in favor of the defendants as to all plaintiffs except for those particular sergeants assigned to the Bomb and Arson Squad and the Accident Reconstruction Squad who are designated in this order as partial nonexempt employees.

IT IS FURTHER ORDERED that the following categories of St. Louis Police Department Sergeants are exempt from the overtime provisions of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201, *et seq.*: Precinct Sergeants; Detective Sergeants; Desk Sergeants; Intelligence Sergeants; Homicide Sergeants; Auto Theft/Fraud Division Sergeants; Narcotics Sergeants; Vice Sergeants; Crimes Against Persons Sergeants; Warrant/Fugitive Sergeants; Public Affairs Sergeants; Mounted Police Sergeants; Mobile Reserve Sergeants; Canine Unit Sergeants; Prisoner Processing Sergeants; Identification Section Sergeants; Traffic Safety Division Sergeants; Academy Sergeants; Evidence Technician Sergeant; Job Performance Sergeants; Internal Affairs Sergeants; Quality Control Sergeants and Special Assignment Sergeants, unless otherwise eligible as defined in the judgment of this Court.

IT IS FURTHER ORDERED that the following categories of St. Louis Police Department Sergeants are nonexempt: Bomb and Arson Sergeants and Accident Reconstruction Sergeants, and are therefore eligible for the benefit of overtime as herein defined and described.

IT IS FURTHER ORDERED that the issue of damages shall be presented to a magistrate or hearing officer to be appointed by the Court. The magistrate or hearing officer may adduce testimony and accept evidence on the issue of damages and submit recommendation to this Court for review.

Inasmuch as all other sergeants are considered exempt, none of them are entitled to overtime pay for work previously concluded. However, the Court does not wish by this Order to encourage actions by the defendant Board members or command staff which would treat exempt sergeants unfairly by permitting excessive utilization of sergeants in nonexempt functions. Merely labeling a sergeant as exempt should not deprive him of compensation for excessive, repetitive, or continuous nonexempt duties. Accordingly, the following procedures are to be followed prospectively or in the future.

If any sergeant believes the performance of duties of a nonexempt nature (e.g., patrolman duties of arrests and investigations) have been required which culminate in egregious overtime because performance of these duties has been *continuous, repetitive,* and/or for an *excessive* amount of time, the sergeant may file a claim for overtime. If these circumstances occur, as enunciated herein, those sergeants may fall within the protection of the FLSA and may be entitled to overtime compensation.

If, in the future, a sergeant believes that entitlement to overtime compensation is due because the requirements of continuous, repetitive, and excessive demands have been required for nonexempt activities, the sergeant may file a motion before this Court seeking such compensation. The claims, in the form of pretrial motions, must be filed in writing within one year of the nonexempt duty and must provide specific details as to when the nonexempt duties occurred, the nature and extent of those duties, and the person(s) who directed such duties. The Court, by this Order, hopes that such continuous, repetitive, and excessive nonexempt duties will rarely occur. If, however, these specific conditions do occur, those sergeants will be eligible for the appropriate overtime compensation.

SO ORDERED.

Dated this 22nd day of April, 1994.

/s/ Clyde S. Cahill
CLYDE S. CAHILL
United States District Judge

APPENDIX D

[Filed Aug. 26, 1994]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Cause No. 88-2071-C (4)

FRANCIS BERNARD AUER, *et al.*,
Plaintiffs,

v.

ANNE MARIE CLARKE, *et al.*,
Defendants.

ORDER AND
ENTRY OF FINAL JUDGMENT

In accordance with the evidence adduced at trial and the stipulation agreed to by the parties (a copy of which is attached hereto), judgment is entered in favor of plaintiffs for those particular St. Louis police sergeants assigned to the Bomb and Arson Squad and the Accident Reconstruction Squad designated in this Court's April 22, 1994 Order as partial nonexempt employees in the amount of $9,284.00, which includes attorneys' fees and costs. Judgment is entered in favor of defendants as to all other issues.

SO ORDERED.

Dated this 26th day of August, 1994.

/s/ Clyde S. Cahill
CLYDE S. CAHILL
United States District Judge

APPENDIX E

[Filed Oct. 30, 1991]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Cause No. 88-2071-C-(4)

FRANCIS BERNARD AUER, *et al.*,
Plaintiffs,

v.

JAMES O'FLYNN, *et al.*,
Defendants.

MEMORANDUM AND ORDER

This matter comes before the Court on plaintiffs' motion for partial summary judgment on the issue of liability, as well as defendants' particular motion for summary judgment with respect to plaintiff Manuel Delgado only.

Plaintiffs bring this action for alleged violations of the time-and-one-half provisions for overtime work pursuant to the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* (FLSA).

While this memorandum trails in detail the specific provisions of pertinent sections of the Fair Labor Standards Act, as cited by the plaintiffs, this Court is not now convinced that its applicability is as broad and conclusory as plaintiffs suggest. First, the St. Louis Police Department is not an ordinary civilian administrative agency; on the contrary, its function and mission require substantially higher levels of immediate responses than normally expected. These needs may well negate part of the ground rules which would be consonant with ordinary municipal functions. Second, the question of exemption from overtime compensation may well be unique because of the precarious fiscal condition of most municipalities.

But for now, in order to respond to the specific arguments advanced in the plaintiffs' motion for summary judgment, the Court will shadow the plaintiffs' arguments, and temporarily concede the applicability of the law to a quasi-military organization which is solely financed by a municipality with limited public funds.

Plaintiffs are all sergeants for the City of St. Louis, except for Delgado who is a lieutenant. Plaintiffs allege they have not been paid compensation in addition to their salaries for working overtime, whether it be eight hours in a day, forty hours in a week, or 171 hours in the twenty-eight day work period adopted by the Department pursuant to 29 U.S.C. § 207(k). The defendants pay FLSA overtime to all personnel classified below the rank of sergeant. Plaintiffs argue that the defendants consider them exempt under the "executive" exception, 29 U.S.C. §213(a)(1), *see also* 29 C.F.R. § 541.1(a)-(f).

Specifically, plaintiffs argue that they are not FLSA-exempt executives because: (a) St. Louis police sergeants and lieutenants are hourly employees; (b) St. Louis police sergeants' primary duty is neither management nor directly related to management policy making or general business operations; and (c) St. Louis police sergeants assigned to internal affairs, field inspection, and some investigators do not supervise at least two people. Defendants argue that there are material facts directly in dispute such that summary judgment is inappropriate. Defendants do concede that this Court may, nonetheless, dispose of certain elements of defendant's claim of exemption.

I. ANALYSIS

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment shall be rendered forthwith if the pleading, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that the moving party is entitled to judgment as a matter of law. The moving party must demonstrate that the record before it does not disclose a genuine dispute on a material fact. *Celotex v. Catrell,* 477 U.S. 317 (1986); *City of Mt. Pleasant, Iowa v. Associated Electrical Cooperatves, Inc.,* 838 F.2d 268 (8th Cir. 1988). Once the moving party has met its burden, the opponent must show the Court that there is a genuine dispute on a material issue. *City of Mt. Pleasant,* 838 F.2d at 274. All reasonable inferences from the evidence presented must be drawn in favor of the opposing party. *Masushita Electric Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 106 S.Ct. 1348, 1356-57 (1986).

Under the applicable "short test" pursuant to 29 U.S.C. Section 541.1(f), the elements necessary to qualify for the executive exemption are:

> a) The plaintiffs' primary duty must consist of management of a customarily recognized subdivision of the department;
>
> b) The plaintiffs are compensated on a salary basis at a rate not less than $250.00 per week; and
>
> c) The plaintiffs customarily and regularly direct the work of two or more employees.

The employer bears the burden of showing that an employee is exempt under the Act. *Corning Glass Works v. Brennan,* 417 U.S. 188, 196-97 (1974); *Walling v. General Industries Co.,* 330 U.S. 545, 548-49 (1947).

II. LIEUTENANT DELGADO

The Court believes the only contested issues regarding plaintiff Delgado are whether his pay is on a salaried basis and whether his primary duties are managerial.[1] Plaintiff Delgado challenges his salaried status because (1) his pay is subject to reduction by manner of disciplinary leave without pay due to nonattendance (of less than a full day) during his shift; (2) his "comp time," (compensatory time) accumulated for overtime work while he was a nonexempt employee and carried over after promotion, is subject to being offset by nonattendance time on an hour-by-hour basis; and (3) his pay is at a premium for shift time during onerous hours of the night (a premium which is based on the number of such hours worked).

The Court, after careful consideration, is not persuaded by plaintiff's first argument in this regard because this kind of activity relates to possible disciplinary action that could be taken if plaintiff Delgado was absent without leave.[2] There is no evidence before this Court that

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[1] The Court finds no merit to plaintiff Delgado's argument that his platoon is not a recognized "department of [or] subdivision thereof." The organization of the various subdivisions within the Department breaks the city into various districts which are comprised of platoons and precincts. Each district is comprised of platoons commanded by district lieutenants. The platoons are comprised of precincts to which certain police officers are assigned, with a sergeant in charge of each precinct. Thus, the Court believes that any designation of platoons and precincts as anything other than recognized subdivisions of the district is unsubstantiated. See 29 C.F.R. § 104(a) (delineation by the statute that an exempt employee must manage a recognized unit with a continuing function.)

[2] Department Rule 7.004(c)(1) specifies that disciplinary action may be taken against a member of the Department who withdraws, resigns, or absents himself from duty without leave or fails to report for duty at his regularly appointed time. There are many possible penalties ranging from a reprimand to a five day suspension or dismissal for such offenses.

there exists any Departmental procedure for deducting from or "docking" a sergeant or higher ranking officer on an hour-by-hour basis because he or she did not work a certain number of hours. *See Harris v. District of Columbia*, 709 F. Supp. 238 (D.D.C. 1989); *District of Columbia Nurses Ass'n v. District of Columbia*, No. 87-1685 (D.D.C. Jan. 28, 1989) (where no evidence of an employee actually being docked for time missed, the court is not required to find that plaintiffs are not salaried).

Additionally, plaintiff Delgado argues that other factors should be considered, such as shift differential, compensatory time for overtime worked and recreational days computed, for salary purposes, into hourly equivalents. The Court, however, is not persuaded by plaintiff's arguments. Such additional compensation is not inconsistent with the salary basis of payment. See 29 C.F.R. § 541.118(a)-(b). Furthermore, shift differential is paid to every officer of every rank. The Court believes that a premium paid on account of duty during onerous hours, by its very nature, must correspond to the number of such hours worked; much the same as a percentage sales commission, by its very nature, corresponds to the size of the sale.[3] Plaintiff Delgado also challenges his salaried status by alleging that he does not have the discretion to control his work and his schedules which are indicative to payment on a salary basis. The Court, however, finds little merit to plaintiff's argument in this regard. Plaintiff

[3] This analogy implicates 29 C.F.R. § 541.118(b) which allows salaried status when the employee receives a predetermined amount plus "extras," e.g., sales commissions, etc. However, the Court does not rely on § 541.118(b) in holding that Delgado is salaried because his salary is not supplemented with extras. Rather, it is increased for different, or at least more burdensome work, as opposed to fluctuating on account of quality or quantity of work. Therefore, his pay scheme falls squarely within the 29 C.F.R. § 541.118(a) definition of salaried, and there is no need to look further.

Delgado is paid on a salary basis and must take whatever time is needed to complete the work assigned. He does have the discretion to prioritize those assignments based on their relative importance. The Court believes that this is consistent with the salary basis of compensation.

Plaintiff Delgado also challenges his exempt status in that he alleges that his primary duty is not managerial since he performs the same functions as his nonexempt subordinates. It appears that Delgado has withdrawn this contention but, whether he has or not, it is nevertheless without merit. As a lieutenant, Delgado is a watch commander which means he commands a platoon consisting of approximately 30 subordinate officers. Moreover, after considering a list of Delgado's functions, the Court believes that plaintiff's primary duty is managerial. Plaintiff's arguments appear to be mere conclusions.

The Court, therefore, finds that plaintiff Delgado is employed in a bona fide executive capacity within the meaning of the FLSA and is exempt from its overtime pay and record keeping requirements. Consequently, the Court shall grant defendants' motion for summary judgment on the claims of plaintiff Delgado.

III. PLAINTIFF SERGEANTS

The Court now turns to the plaintiff sergeants' motion for partial summary judgment. The Court believes that under the "short test," the only contested issue in this regard is whether each of the sergeant's primary duty is the management of a customarily recognized department.[4] At the time of the filing of this lawsuit all but two of plaintiff sergeants functioned as precinct sergeants in one or more of the Department's nine districts. Defendants argue that material facts are directly in dispute concern-

[4] The Court notes that its position regarding platoons as recognized units or subdivisions within the St. Louis Police Department is equally applicable to the precincts assigned to plaintiff precinct sergeants. (See footnote 1 *supra*.)

ing the primary duty of each of the plaintiffs and, as such, summary judgment is inappropriate.

Plaintiff sergeants allege, contrary to defendants' motion in opposition, that material facts are not at issue. Furthermore, the plaintiffs allege if facts do exist that are in dispute, these facts are not material to the issues before the Court.

After careful consideration, the Court finds that there do exist material facts at issue with respect to the duties and functions performed by plaintiff sergeants sufficient to overcome plaintiffs' motion for summary judgment. The Court finds that plaintiffs have simply made conclusory allegations as to the exact nature and substance of their duties. As a matter of law, the Court should not grant plaintiffs' motion. Consequently, the Court shall deny plaintiff sergeants' motion for summary judgment, but without prejudice. Accordingly,

IT IS HEREBY ORDERED that defendant's motion for summary judgment as to plaintiff Delgado is granted.

IT IS FURTHER ORDERED that plaintiff sergeants' motion for partial summary judgment is denied.

Dated this 30th day of October, 1991.

/s/ Clyde S. Cahill
CLYDE S. CAHILL
United States District Judge

APPENDIX F

STATUTES AND REGULATIONS

29 U.S.C.

§ 213. Exemptions

(a) Minimum wage and maximum hour requirements. The provisions of sections 6 (except section 6(d) in the case of paragraph (1) of this subsection) and 7 [29 USCS §§ 206, 207] shall not apply with respect to—

> (1) any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of the Administrative Procedure Act except than [that] an employee of a retail or service establishment shall not be excluded from the definition of employee employed in a bona fide executive or administrative capacity because of the number of hours in his workweek which he devotes to activities not directly or closely related to the performance of executive or administrative activities, if less than 40 per centum of his hours worked in the workweak are devoted to such activities); . . .

* * * *

29 C.F.R. Part 541.

§ 541.1 Executive.

The term *employee employed in a bona fide executive * * * capacity* in section 13(a)(1) of the Act shall mean any employee;

(a) Whose primary duty consists of the management of the enterprise in which he is employed or of a customarily recognized department of subdivision thereof; and

(b) Who customarily and regularly directs the work of two or more other employees therein; and

(c) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; and

(d) Who customarily and regularly exercises discretionary powers; and

(e) Who does not devote more than 20 percent, or, in the case of an employee of a retail or service establishment who does not devote as much as 40 percent, of his hours of work in the workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (d) of this section: *Provided*, That this paragraph shall not apply in the case of an employee who is in sole charge of an independent establishment or a physically separated branch establishment, or who owns at least a 20-percent interest in the enterprise in which he is employed; and

(f) Who is compensated for his services on a salary basis at a rate of not less than $155 per week (or $130 per week, if employed by other than the Federal Government in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities: *Provided*, That an employee who is compensated on a

salary basis at a rate of not less than $250 per week (or $200 per week, if employed by other than the Federal Government in Puerto Rico, the Virgin Islands or American Samoa), exclusive of board, lodging, or other facilities, and whose primary duty consists of the management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof, and includes the customary and regular direction of the work of two or more other employees therein, shall be deemed to meet all the requirements of this section.

[38 FR 11390, May 7, 1973, as amended at 40 FR 7092, Feb. 19, 1975]

EFFECTIVE DATE NOTE: Paragraph (f) in § 541.1 was revised at 46 FR 3013, Jan. 13, 1981. In accordance with the President's Memorandum of January 29, 1981 (46 FR 11227, Feb. 6, 1981), the effective date was postponed indefinitely at 46 FR 11972, Feb. 12, 1981.

The text of paragraph (f) set forth above remains in effect pending further action by the issuing agency. The text of the postponed regulation appears below.

§ 541.1 Executive.

* * * *

(f) Who is compensated for his services on a salary basis at a rate of not less than $225 per week beginning February 13, 1981 and $250 per week beginning February 13, 1983 (or $180 per week beginning February 13, 1981 and $200 per week beginning February 13, 1983. If employed by other than the Federal Government in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities: PROVIDED, That an employee who is compensated on a salary basis at a rate of not less than $320 per week beginning February 13, 1981 and $345 per week beginning February 13, 1983 (or $260 per week beginning February 13, 1981 and $285 per week beginning February 13, 1983, if employed

by other than the Federal Government in Puerto Rico, the Virgin Islands or American Samoa), exclusive of board, lodging, or other facilities, and whose primary duty consists of the management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof, and includes the customary and regular direction of the work of two or more other employees therein, shall be deemed to meet all the requirements of this section.

§ 541.2 Administrative.

The term *employee employed in a bona fide* * * * *administrative* * * * *capacity* in section 13(a)(1) of the Act shall mean any employee:

(a) Whose primary duty consists of either;

(1) The performance of office or nonmanual work directly related to management policies or general business operations of his employer or his employer's customers, or

(2) The performance of functions in the administration of a school system, or educational establishment or institution, or of a department or subdivision thereof, in work directly related to the academic instruction or training carried on therein; and

(b) Who customarily and regularly exercises discretion and independent judgment; and

(c)(1) Who regularly and directly assists a proprietor, or an employee employed in a bona fide executive or administrative capacity (as such terms are defined in the regulations of this subpart), or

(2) Who performs under only general supervision work along specialized or technical lines requiring special training, experience, or knowledge, or

(3) Who executes under only general supervision special assignments and tasks; and

(d) Who does not devote more than 20 percent, or, in the case of an employee of a retail or service establishment who does not devote as much as 40 percent, of his hours worked in the workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (c) of this section;

(e)(1) Who is compensated for his services on a salary or fee basis at a rate of not less than $155 per week ($130 per week, if employed by other than the Federal Government in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities, or

(2) Who, in the case of academic administrative personnel, is compensated for services as required by paragraph (e)(1) of this section, or on a salary basis which is at least equal to the entrance salary for teachers in the school system, educational establishment, or institution by which employed: *Provided*, That an employee who is compensated on a salary or fee basis at a rate of not less than $250 per week ($200 per week if employed by other than the Federal Government in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities, and whose primary duty consists of the performance of work described in paragraph (a) of this section, which includes work requiring the exercise of discretion and independent judgment, shall be deemed to meet all the requirements of this section.

[38 FR 11390, May 7, 1973, as amended at 40 FR 7092, Feb. 19, 1975]

EFFECTIVE DATE NOTE: Paragraph (e) in § 541.2 was revised at 46 FR 3013, Jan. 13, 1981. In accordance with the President's Memorandum of January 29, 1981 (46 FR 11227, Feb. 6, 1981), the effective date was postponed indefinitely at 46 FR 11972, Feb. 12, 1981.

The text of paragraph (e) set forth above remains in effect pending further action by the issuing agency. The text of the postponed regulation appears below.

§ 541.2 Administrative.

* * * *

(e)(1) Who is compensated for his services on a salary or fee basis at a rate of not less than $225 per week beginning February 13, 1981 and $250 per week beginning February 13, 1983 ($180 per week beginning February 13, 1981 and $200 per week beginning February 13, 1983, if employed by other than the Federal Government in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities, or

(2) Who, in the case of academic administrative personnel, is compensated for services as required by paragraph (e)(1) of this section, or on a salary basis which is at least equal to the entrance salary for teachers in the school system, educational establishment, or institution by which employed: *Provided*, That an employee who is compensated on a salary or fee basis at a rate of not less than $320 per week beginning February 13, 1981 and $345 per week beginning February 13, 1983 ($260 per week beginning February 13, 1981 and $285 per week beginning February 13, 1983, if employed by other than the Federal Government in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities, and whose primary duty consists of the performance of work described in paragraph (a) of this section, which includes work requiring the exercise of discretion and independent judgment, shall be deemed to meet all the requirements of this section.

* * * *

§ 541.118 Salary basis.

(a) An employee will be considered to be paid "on a salary basis" within the meaning of the regulations if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work

performed. Subject to the exceptions provided below, the employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked. This policy is also subject to the general rule that an employee need not be paid for any workweek in which he performs no work.

(1) An employee will not be considered to be "on a salary basis" if deductions from his predetermined compensation are made for absences occasioned by the employer or by the operating requirements of the business. Accordingly, if the employee is ready, willing, and able to work, deductions may not be made for time when work is not available.

(2) Deductions may be made, however, when the employee absents himself from work for a day or more for personal reasons, other than sickness or accident. Thus, if an employee is absent for a day or longer to handle personal affairs, his salaried status will not be affected if deductions are made from his salary for such absences.

(3) Deductions may also be made for absences of a day or more occasioned by sickness or disability (including industrial accidents) if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by both sickness and disability. Thus, if the employer's particular plan, policy or practice provides compensation for such absences, deductions for absences of a day or longer because of sickness or disability may be made before an employee has qualified under such plan, policy or practice, and after he has exhausted his leave allowance thereunder. It is not required that the employee be paid any portion of his salary for such days or days for which he receives compensation for leave under such plan, policy or practice. Similarly, if the employer operates under a State sickness and disability insurance law, or a private sickness and disability insurance plan, deductions may be made for absences of a working day or longer if benefits are

provided in accordance with the particular law or plan. In the case of an industrial accident, the "salary basis" requirement will be met if the employee is compensated for loss of salary in accordance with the applicable compensation law or the plan adopted by the empioyer, provided the employer also has some plan, policy or practice of providing compensation for sickness and disability other than that relating to industrial accidents.

(4) Deductions may not be made for absences of an employee caused by jury duty, attendance as a witness, or temporary military leave. The employer may, however, offset any amounts received by an employee as jury or witness fees or military pay for a particular week against the salary due for that particular week without loss of the exemption.

(5) Penalties imposed in good faith for infractions of safety rules of major significance will not affect the employee's salaried status. Safety rules of major significance include only those relating to the prevention of serious danger to the plant, or other employees, such as rules prohibiting smoking in explosive plants, oil refineries, and coal mines.

(6) The effect of making a deduction which is not permitted under these interpretations will depend upon the facts in the particular case. Where deductions are generally made when there is no work available, it indicates that there was no intention to pay the employee on a salary basis. In such a case the exemption would not be applicable to him during the entire period when such deductions were being made. On the other hand, where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.

(b) *Minimum guarantee plus extras.* It should be noted that the salary may consist of a predetermined

amount constituting all or part of the employee's compensation. In other words, additional compensation besides the salary is not inconsistent with the salary basis of payment. The requirement will be met, for example, by a branch manager who receives a salary of $155 or more a week and in addition, a commission of 1 percent of the branch sales. The requirement will also be met by a branch manager who receives a percentage of the sales or profits of the branch, if the employment arrangement also includes a guarantee of at least the minimum weekly salary (or the equivalent for a monthly or other period) required by the regulations. Another type of situation in which the requirement will be met is that of an employee paid on a daily or shift basis, if the employment arrangement includes a provision that the employee will receive not less than the amount specified in the regulations in any week in which the employee performs any work. Such arrangements are subject to the exceptions in paragraph (a) of this section. The test of payment on a salary basis will not be met, however, if the salary is divided into two parts for the purpose of circumventing the requirement of payment "on a salary basis". For example, a salary of $200 in each week in which any work is performed, and an additional $50 which is made subject to deductions which, are not permitted under paragraph (a) of this section.

(c) *Initial and terminal weeks.* Failure to pay the full salary in the initial or terminal week of employment is not considered inconsistent with the salary basis of payment. In such weeks the payment of a proportionate part of the employee's salary for the time actually worked will meet the requirement. However, this should not be construed to mean that an employee is on a salary basis within the meaning of the regulations if he is employed occasionally for a few days and is paid a proportionate part of the weekly salary when so employed. Moreover, even payment of the full weekly salary under such circumstances would not meet the requirement, since casual

or occasional employment for a few days at a time is inconsistent with employment on a salary basis within the meaning of the regulations.

[38 FR 11390, May 7, 1973, as amended at 40 FR 7092, Feb. 19, 1975]

EFFECTIVE DATE NOTE: Paragraph (b) in § 541.118 was revised at 46 FR 3014, Jan. 13, 1981. In accordance with the President's Memorandum of January 29, 1981 (46 FR 11227, Feb. 6, 1981), the effective date was postponed indefinitely at 46 FR 11972, Feb. 12, 1981.

The text of paragraph (b) set forth above remains in effect pending further action by the issuing agency. The text of the postponed regulation appears below.

§ 541.118 Salary basis.

* * * *

(b) *Minimum guarantee plus extras.* It should be noted that the salary may consist of a predetermined amount constituting all or part of the employee's compensation. In other words, additional compensation besides the salary is not inconsistent with the salary basis of payment. The requirement will be met, for example, by a branch manager who receives a salary of $250 or more a week and in addition, a commission of 1 percent of the branch sales. The requirement will also be met by a branch manager who receives a percentage of the sales or profits of the branch, if the employment arrangement also includes a guarantee of at least the minimum weekly salary (or the equivalent for a monthly or other period) required by the regulations. Another type of situation in which the requirement will be met is that of an employee paid on a daily or shift basis, if the employment arrangement includes a provision that the employee will receive not less than the amount specified in the regulations in any week in which the employee performs any work. Such arrangements are subject to the exceptions in paragraph (a) of this section. The test of

payment on a salary basis will not be met, however, if the salary is divided into two parts for the purpose of circumventing the requirement of payment "on a salary basis". For example, a salary of $300 in each week in which any work is performed, and an additional $55 which is made subject to deductions which are not permitted under paragraph (a) of this section.

* * * *

§ 541.5d Special provisions applicable to employees of public agencies.

(a) An employee of a public agency who otherwise meets the requirements of § 541.118 shall not be disqualified from exemption under §§ 541.1, 542.2, or 541.3 on the basis that such employee is paid according to a pay system established by statute, ordinance, or regulation, or by a policy or practice established pursuant to principles of public accountability, under which the employee accrues personal leave and sick leave and which requires the public agency employee's pay to be reduced or such employee to be placed on leave without pay for absences for personal reasons or because of illness or injury of less than one work-day when accrued leave is not used by an employee because—

(1) permission for its use has not been sought or has been sought and denied.

(2) accrued leave has been exhausted; or

(3) the employee chooses to use leave without pay.

(b) Deductions from the pay of an employee of a public agency for absences due to a budget-required furlough shall not disqualify the employee from being paid "on a salary basis" *except* in the workweek in which the furlough occurs and for which the employee's pay is accordingly reduced.

[57 FR 37677, Aug. 19, 1992]

DEPARTMENT OF LABOR
Employment Standards Administration;
Wage and Hour Division

29 CFR Part 541
Exemptions From Minimum Wage and Overtime Compensation Requirements of the Fair Labor Standards Act; Public Sector Employers

56 FR 45824

September 6, 1991

AGENCY: Wage and Hour Division, Employment Standards Administration, Labor

ACTION: Interim final rule; request for comments.

SUMMARY: These interim final regulations relative to governmental pay practices under Regulations, 29 CFR part 541, contain revised criteria for exemption from the minimum wage and overtime compensation requirements of the Fair Labor Standards Act (FLSA) for executive, administrative, and professional employees. The purpose of this revision is to provide an exception from certain provisions requiring payment "on a salary basis" applicable only to public sector employees.

DATES: Effective Date: The interim final rule is effective on September 6, 1991.

Comments are due on or before October 7, 1991.

ADDRESSES: Submit written comments to John R. Fraser, Acting Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, room S-3502, 200 Constitution Avenue, NW., Washington, DC 20210. Commenters who wish to receive notification of receipt of comments are requested to include a self-addressed, stamped post card.

FOR FURTHER INFORMATION CONTACT: J. Dean Speer, Director, Division of Policy and Analysis, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, room S-3506, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 523-8412 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION:

I. Background

Since the enactment of the FLSA in 1938, Congress and the Supreme Court have each periodically acknowledged the special circumstances of, and the different treatment to be accorded to, governmental employers and employees under the FLSA, as distinguished from employment in the private sector.

The regulations governing exemption from the requirements of the Act for employees who are "executive, administrative, professional * * *" generally require that such employees meet regulatory standards with respect to both their duties and their compensation. Compensation must be greater than the amount specified in the regulations, and must be "on a salary basis." These matters are defined and explained in 29 CFR part 541. These regulations were adopted prior to the extension of FLSA coverage to public employees and, therefore, make no distinction between public and private employment.

In administering the FLSA in the public sector [1], the Department has become aware that few public employers

[1] With respect to Federal employees, as provided in section 4(f) of FLSA, DOL administers the Act for employees employed in the Library of Congress, United States Postal Service, Postal Rate Commission, and the Tennessee Valley Authority; the Office of Personnel Management (OPM) administers FLSA with respect to all other employees of the Federal government except certain Congressional employees. See 29 U.S.C. section 204(f), Reorganization Plan No. 2 of 1978 (92 Stat. 3783), and section 8 of the Fair Labor

compensate employees in a manner that meets the "on a salary basis" requirement for exemption under the current regulation. Governmental payroll systems commonly prohibit paying employees for time not actually worked. Systems of leave in the public sector (as often is the case in the private sector) are generally relied on as the exclusive method to permit employees who might otherwise not be compensated for periods of absence to avoid reduction of compensation in connection with such absences.

The Department initially attempted to address this problem by means of an enforcement policy, adopted by the Wage and Hour Division on January 9, 1987. The policy, which is still in effect, provides that the Division, will not deny exemption pursuant to section 13(a)(1) of the FLSA to an otherwise exempt executive, administrative, or professional employee in the public sector whose pay is reduced by deductions for absence(s) of less than a day for personal reasons, or because of illness or accident, because the employee does not have, or has exhausted available paid leave for such absence(s). This policy applies only where applicable State or local law, in effect before April 15, 1986, prohibits payment to employees for such absences which are not covered by paid leave.

The Wage and Hour Division's 1987 enforcement policy does not affect the rights of public employees to file private lawsuits under section 16(b) of the FLSA. Since the U.S. Supreme Court's decision in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), there have been numerous lawsuits by public employees to recover overtime pay. The courts in these cases have approached the construction of the regulations in different fashions, and have reached differing results.

Standards Amendments of 1989 (Pub. L. 101-157). Thus, the reference to Federal government employees in this rulemaking extends the revision to those Federal employees with respect to whom DOL is authorized to administer the Act.

Some courts have found the exemption to be inapplicable for the sole reason that the public entity's pay practices did not meet the "on a salary basis" requirement. Construing the existing regulations, some courts have held that employees under a pay system which requires that deductions be made when the employee is absent and has no leave are not paid "on a salary basis" even where no such deductions have occurred. In these circumstances the "salary basis" requirement is not met because the employee's compensation was subject to deductions for absences of less than one day when all accumulated leave was exhausted. See, *e.g.*, *Abshire v. County of Kern*, 908 F.2d 483 (9th Cir. 1990) cert. denied, 111 S.Ct. 785, rehearing denied, 111 S.Ct. 1341 (1991); *Banks v. City of North Little Rock*, 708 F. Supp. 1023 (E.D. Ark. 1988); *D'Camera v. District of Columbia*, 693 F. Supp. 1208 (D.D.C. 1988); *Hawks v. City of Newport News, Va.*, 707 F. Supp. 212 (E.D. Va. 1988).

On the other hand, some courts have considered that even in the above-described circumstances a salary was not subject to deduction where there was no evidence that the employee's pay was ever reduced, that only actual and not "theoretical" deductions could invalidate the salary basis of compensation, and that rare instances of docking pay for absences of less than a day did not defeat the exemption (except in a workweek in which deduction was made). See, *e.g.*, *Atlanta Professional Firefighters Union v. Atlanta*, 920 F.2d 800 (11th Cir. 1991); *Harris v. District of Columbia*, 709 F. Supp. 238 (D.D.C. 1989); and *DC Nurses Assn. v. District of Columbia*, 29 WH Cases 868 (D.D.C. 1988). Some courts have also allowed application of the "correction" provisions at 29 CFR 541.118(a)(6) to preserve exempt status in cases where the public employer made "inadvertent" deductions from pay for absences of less than a day when leave was exhausted, reimbursed the affected employee for such deductions, and promised future compliance. See *e.g.*, *Hartman*

v. Arlington County, Va., 720 F. Supp. 1227 (E.D. Va. 1989), *aff'd*, 903 F.2d 290 (4th Cir. 1990); *Fire Fighters Local 2141 v. City of Alexandria, Va.*, 720 F. Supp. 1230 (E.D. Va. 1989), *aff'd.*, 912 F.2d 463 (4th Cir. 1990); *Harkins v. City of Chesapeake*, 29 WH Cases 1399 (E.D. Va. 1988). *Chadwick v. City of Norfolk, Va.*, 29 WH Cases 1407 (E.D. Va. 1988); and *Sarver v. City of Roanoke, Va.*, 29 WH Cases 1442 (W.D. Va. 1989).

The Department has been considering (and continues to consider) a variety of posible changes to the regulations governing the exemption for bona fide executive administrative, and professional employees, including the particular requirement in the public sector that such employees be paid on a salary basis.

In the meantime, these diverging judicial interpretations and accompanying confusion have developed, resulting in the exposure of governmental employers to potentially enormous and generally unexpected back wage liabilities to employees, some of whom would clearly be exempt if duties and amount of compensation alone were examined. Such unforeseen liabilities could seriously threaten the fiscal integrity of State and local governmental agencies, and could seriously disrupt widespread pay practices that were designed and intended to serve the public trust and were established long before State and local government employees were subject to the Fair Labor Standards Act.

State and local government jurisdictions have varied pay policies. Some of these pay policies are based on constitutional or statutory provisions while others are derived from regulations or policies that have evolved over the years. These pay systems are generally premised on the concept—based on principles of public accountability—that governmental employees should not be paid for time not worked, and that there is a need to be accountable to the taxpayers for the expenditure of public funds.

For these reasons the Department is of the view that public sector pay systems must be analyzed differently from, because they are significantly distinguishable from, private sector pay systems. In the Department's judgment, certain aspects of the existing "salary basis" regulatory requirement for exemption are unduly restrictive when applied in the public sector. These aspects are not, in the Department's judgment, valid indicators in the public sector of the *bona fides* of a claimed exemption under section 13(a)(1). State and local government are thus inappropriately deprived of the opportunity to apply the section 13(a)(1) exemption to their employees who would otherwise be properly exempt.

While the Department is continuing its overall review of the full range of issues raised by the public comments submitted on its advance notice of proposed rulemaking of November 19, 1985 (50 FR 47696), it is undertaking this separate rulemaking on the specific issue of application of the "salary basis" of payment for public sector employees. As discussed below, it is considered necessary to issue an interim final rule so as to stem any accrual of additional liability to State and local governments while consideration is given to the comments received on the rule.

II. Paperwork Reduction Act

This regulation contains no reporting or recordkeeping requirements.

III. Summary of the Rule

A new § 541.5d is being added that provides that an otherwise exempt public sector employee who is paid according to a pay system that requires the use of paid leave and, absent the use of paid leave, reduces the employee's pay for absences of less than one workday, will not be disqualified from exemption due to such pay system. This rule also provides that the exemption will not

be defeated by deductions from salary caused by budget-required furloughs, which are not regular and recurring, except in the workweek in which such a deduction occurs.

Executive Order 12291

This rule is not considered to be a "major rule" within the meaning of Executive Order 12291, in that under the status quo, most public employers consider otherwise-exempt employees to be exempt, notwithstanding public sector pay systems under which their pay is subject to deductions for absences of less than one day. Furthermore, under current Department of Labor enforcement policy, the exemption would generally not be denied by the Department to such employees. Therefore the rule is not likely to result in: (1) An annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets. Therefore, no regulatory impact analysis is required.

Regulatory Flexibility Analysis

The Department has determined that this rulemaking will not have a significant economic impact on a substantial number of small entities. This conclusion is based on the fact that under the status quo, most public employers consider otherwise-exempt employees to be exempt, notwithstanding public sector pay systems under which their pay is subject to deductions for absences of less than one day. Furthermore, under the current Department of Labor enforcement policy, the exemption would generally not be denied by the Department to such employees. In addition, because no notice of proposed rulemaking is required for the rule under 5 U.S.C. 553(b), the requirements of the Regulatory Flexibility Act pertaining to regulatory flexibility analysis do not apply to this rule. See 5 U.S.C. 601(2).

Publication as an Interim Final Rule

Application of the salary basis test to State and local government employees may result in denial of the exemption to thousands of such employees who have been considered exempt by their employers. The Department considers it inappropriate that public sector employees be denied the exemption because they fail to meet the "on a salary basis" test under pay systems imposed by law, regulation or public policy that were established pursuant to principles of public accountability even before extension of the Act to such employees. Such application could well result in enormous, unforseen liability of such governments and may threaten their fiscal integrity. For these reasons it has been determined that an interim final rule is appropriate to forestall accrual of additional liability while the Department receives and considers comments in the preparation of any final rule which would be determined to be appropriate. Accordingly, the Secretary finds, pursuant to 5 U.S.C. 553(b)(3)(B), that prior notice and public comment are contrary to the public interest.

For the same reasons, the Secretary also for good cause finds, pursuant to 5 U.S.C. 553(d)(3), that this rule cannot be published 30 days before its effective date.

DEPARTMENT OF LABOR
Employment Standards Administration;
Wage and Hour Division

29 CFR Part 541
Exemptions From Minimum Wage and
Overtime Compensation Requirements
of the Fair Labor Standards Act;
Public Sector Employers

56FR45828
September 6, 1991

AGENCY: Wage and Hour Division. Employment Standards Administration, Labor.

ACTION: Notice of proposed rulemaking, request for comments.

SUMMARY: The Department of Labor proposes to revise the regulations governing exemption from minimum wage and overtime compensation under the Fair Labor Standards Act (FLSA) for executive, administrative and professional employees in the public sector. This proposal would allow governmental entities to restore eligibility for exemption under the rules governing payment "on a salary basis" at 29 CFR part 541, § 541.118(a)(6), for otherwise-exempt public employees subject to pay systems that provide for the use of paid leave and, when accrued leave is not used, result in deductions from pay for absences of less than one work-day.

DATES: Comments are due on or before Ocotber 7, 1991.

ADDRESSES: Submit written comments to John R. Fraser, Acting Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, room S-3502, 200 Constitution Avenue, NW., Washington, DC 20210. Commenters who wish to receive notification of receipt of comments are requested to include a self-addressed, stamped post card.

FOR FURTHER INFORMATION CONTACT: J. Dean Speer, Director, Division of Policy and Analysis, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, room S-3506, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 523-8412 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION:

I. Background

Since the enactment of the FLSA in 1938, Congress and the Supreme Court has each periodically acknowledged the special circumstances of, and the different treatment to be accorded to, governmental employers and employees under the FLSA, as distinguished from employment in the private sector.

The regulations governing exemption from the requirements of the Act for employees who are "executive, administrative, professional * * *" generally require that such employees meet regulatory standards with respect both to their duties and their compensation. Compensation must be greater than the amount specified in the regulations, and must be "on a salary basis." These matters are defined and explained in 29 CFR part 541. These regulations were adopted prior to the extension of FLSA coverage to public employees and, therefore, make no distinction between public and private employment.

In administering the FLSA in the public sector [1] the Department has become aware that few public employers

[1] With respect to Federal employees, as provided in section 4(f) of FLSA, DOL administers the Act for employees employed in the Library of Congress, United States Postal Service, Postal Rate Commission, and the Tennessee Valley Authority; the Office of Personnel Management (OPM) administers FLSA with respect to all other employees of the federal government except certain Congressional employees. See 29 U.S.C. 204(f), Reorganization Plan No. 2 of 1978 (92 Stat. 3783), and § 8 of the Fair Labor Standards Amendments of 1989 (Pub. L. 101-157). Thus, the reference to Federal Government employees in this rulemaking extends the

compensate employees in a manner that meets the "on a salary basis" requirement for exemption under the current regulation. Governmental payroll systems commonly prohibit paying employees for time not actually worked. Systems of leave in the public sector (as often is the case in the private sector) are generally relied on as the exclusive method to permit employees who might otherwise not be compensated for periods of absence to avoid reduction of compensation in connection with such absences.

The Department initially attempted to address this problem by means of an enforcement policy adopted by the Wage and Hour Division in January 1987. The policy, which it still in effect, provides that the Division will not deny exemption pursuant to section 13(a)(1) of the FLSA to an otherwise exempt executive, administrative, or professional employee in the public sector whose pay is reduced by deductions for absence(s) of less than a day for personal reasons, or because of illness or accident, because the employee does not have, or has exhausted available paid leave for such absence(s). This policy applied only where applicable State or local law in effect prior to April 15, 1986, prohibits payment to employees for such absences which are not covered by paid leave.

The Wage and Hour Division's 1987 enforcement policy does not affect the rights of public employees to file private lawsuits under section 16(b) of the FLSA. Since the U.S. Supreme Court's decision in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), there have been numerous lawsuits by public employees to recover overtime pay. The courts in these cases have approached the construction of the regulations in different fashions, and have reached differing results.

Some courts have found the exemption to be inapplicable for the sole reason that the public entity's pay practices did not meet the "on a salary basis" requirement.

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revision to those Federal employees with respect to whom DOL is authorized to administer the Act.

Construing the existing regulations, some courts have held that employees under a pay system which requires that deductions be made when the employee is absent and has no leave are not paid "on a salary basis" even where no such deductions have occurred. In these circumstances the "salary basis" requirement is not met because the employee's compensation was subject to deductions for absences of less than one day when all accumulated leave was exhausted. *See, e.g., Abshire v. County of Kern*, 908 F.2d 483 (9th Cir. 1990) *cert. denied*, 111 S.Ct. 785, *rehearing denied*, 111 S.Ct. 1341 (1991); *Banks v. City of North Little Rock*, 708 F. Supp. 1023 (E.D. Ark. 1988); *D'Camera v. District of Columbia*, 693 F. Supp. 1208 (D.D.C. 1988); *Hawks v. City of Newport News, Va.*, 707 F. Supp. 212 (E.D. Va. 1988).

On the other hand, some courts have considered that even in the above-described circumstances a salary was not subject to deduction where there was no evidence that the employee's pay was ever reduced, that only actual and not "theoretical" deductions could invalidate the salary basis of compensation, and that rare instances of docking pay for absences of less than a day did not defeat the exemption (except in a workweek in which deduction was made). See, *e.g., Atlanta Professional Firefighters Union v. Atlanta*, 920 F.2d 800 (11th Cir. 1991); *Harris v. District of Columbia*, 709 F. Supp. 238 (D.D.C. 1989); and *D.C. Nurses Assn. v. District of Columbia*, 29 WH Cases 868 (D.D.C. 1988). Some courts have also allowed application of the "correction" provisions at 29 CFR 541.118(a)(6) to preserve exempt status in cases where the public employer made "inadvertent" deductions from pay for absences of less than a day when leave was exhausted, reimbursed the affected employee for such deductions, and promised future compliance. See, *e.g., Hartman v. Arlington County, Va.*, 720 F. Supp. 1227 (E.D. Va. 1989), aff'd, 903 F.2d 290 (4th Cir. 1990); *Fire Fighters Local 2141 v. City of Alexandria, Va.*, 720 F. Supp. 1230 (E.D. Va. 1989), aff'd, 912

F. 2d 463 (4th Cir. 1990); *Harkins v. City of Chesapeake*, 29 WH Cases 1399 (E.D. Va. 1988); *Chadwick v. City of Norfolk, Va.*, 29 WH Cases 1407 (E.D. Va. 1988); and *Sarver v. City of Roanoke, Va.*, 29 WH Cases 1442 (W.D. Va. 1989).

The Department has been considering (and continues to consider) a variety of possible changes to the regulations governing the exemption for bona fide executive, administrative, and professional employees, including the particular requirements in the public sector affecting how employees may be paid on a salary basis. (Interim final regulations implementing a special "salary basis" rule for public sector employers are being published separately this date in the Federal Register, to be codified at 29 CFR 541.5d.)

In the meantime, these diverging judicial interpretations and accompanying confusion have developed, resulting in the exposure of governmental employers to potentially enormous and generally unexpected back wage liabilities to employees, some of whom would clearly be exempt if duties and amount of compensation alone were examined. The payment of such unforeseen liabilities could seriously threaten the fiscal integrity of State and local governmental agencies, and could seriously disrupt widespread pay practices which were designed and intended to serve the public trust and were established long before State and local government employees were subject to the Fair Labor Standards Act.

For these reasons the Department is of the view that public sector pay systems must be analyzed differently from, because they are significantly distinguishable from, private sector pay systems. In the Department's judgment, certain aspects of the existing "salary basis" regulatory requirement for exemption are unduly restrictive when applied in the public sector. State and local governments are thus inappropriately deprived of the opportunity to apply the section 13(a)(1) exemption to their employees who would otherwise be bona fide exempt.

While the Department is continuing its overall review of the full range of issues raised by the public comments submitted on its advance notice of proposed rulemaking of November 19, 1985 (50 FR 47696), it is undertaking this separate rulemaking proposal on the specific issue of measures that could be taken by public employers to restore the exempt status of public employees who would otherwise have been exempt but for pay systems calling for deductions (i.e., where no actual deductions are made and where actual deductions made are reimbursed) inconsistent with the "on a salary basis" requirement for public sector employees.

This proposal would operate in conjunction with the Department's newly-published interim final rule regarding salary basis in the public sector. (See the interim final rule published separately this date in the Federal Register, at 29 CFR 541.5d.) The proposal would, in essence, provide that employees previously subject to deductions under a pay system that now passes muster under § 541.5d, and, with respect to whom actual deductions have been reimbursed, shall be restored to exempt status under § 541.118(a)(6). As with the existing § 541.118 (a)(6), this provision deals with a situation which has arisen unexpectedly when some parts, but not all essential parts, of the regulatory requirements for exemption have been met with respect to public sector employees. Unlike the existing § 541.118(a)(6), which deals primarily with occasional "inadvertent" deductions from the pay of employees who are generally paid in a "salary basis" structure, this provision would deal with the effect of past deductions made by virtue of a pay system that may otherwise have resulted in a complete disallowance of the exemption.

The Department seeks comments on all aspects of this proposal, in particular drawing the attention of commenters to legal and other considerations regarding: (1) The retroactive aspects of the proposal; and (2) the fairness of the proposal, both to employers and employees.

II. Paperwork Reduction Act

This regulation contains no reporting or recordkeeping requirements.

III. Summary of the Rule

The rule provides that eligibility for the exemption under the requirement that employees be paid "on a salary basis" will not be defeated in the case of governmental entities that either: (1) Made no deductions from pay for absences of less than one work-day before the effective date of new regulations promulgated at 29 CFR 541.5d (i.e., September 6, 1991), or (2) reimburse otherwise-exempt public employees for deductions from pay made for absences, for personal reasons or because of illness or injury, of less than one work-day that occurred before the effective date of § 541.5d.

Executive Order 12291

This rule is not considered to be a "major rule" within the meaning of Executive Order 12291, in that under the status quo, most public employers consider otherwise-exempt employees to be exempt, notwithstanding public sector pay systems under which their pay is subject to deductions for absences of less than one day. Furthermore, under the current Department of Labor enforcement policy, the exemption would generally not be denied by the Department to such employees. Therefore the rule is not likely to result in: (1) An annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, federal, state, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets. Therefore, no regulatory impact analysis is required.

Regulatory Flexibility Analysis

The Department has determined that this rulemaking will not have a significant economic impact on a substantial number of small entities. The Secretary has certified to this effect to the Chief Counsel for Advocacy of the Small Business Administration. This conclusion is based on the fact that under the status quo, most public employers consider otherwise-exempt employees to be exempt, notwithstanding that under some public sector pay systems the pay of employees is subject to deductions for absences of less than one day. Furthermore, under current Department of Labor enforcement policy, the exemption would generally not be denied by the Department to such employees.

Document Preparation

This document was prepared under the direction and control of John R. Fraser, Acting Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor.

List of Subjects in 29 CFR Part 541

Labor, Minimum wages, Overtime pay, Salaries, Teachers, Wages.

Accordingly, part 541 of Title 29 of the Code of Federal Regulations is proposed to be amended as set forth below.

APPENDIX G

POLICE MANUAL

METROPOLITAN POLICE DEPARTMENT

City of Saint Louis, Missouri

COLONEL ROBERT E. SCHEETZ

Chief of Police

Published

by the

BOARD OF POLICE COMMISSIONERS

1989

HONORABLE JOHN ASHCROFT

Governor of the State of Missouri

BOARD OF POLICE COMMISSIONERS

COLONEL ROBERT J. BAER	PRESIDENT
COLONEL JOHN J. FRANK	VICE-PRESIDENT
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JESSE HORSTMAN	SECRETARY

COLONEL ROBERT E. SCHEETZ	CHIEF OF POLICE

By virtue of the authority vested in it by law and pursuant to the provisions of Section 84.170, Missouri Revised Statutes, the Board of Police Commissioners of the Metropolitan Police Department of the City of St. Louis, Missouri, has published this manual of rules and regulations for the government and regulation of the Metropolitan Police Department of said city, effective on and after the date set out below.

The Board reserves the right to alter, amend, or revoke any of said rules and regulations and to make additional ones from time to time as circumstances or the good of the service may, in the judgment of the Board, require.

The Police Manual of 1984 and all General Orders of the Board of Police Commissioners issued prior to the date set out below are hereby repealed.

By Order of the Board of Police Commissioners of the City of Saint Louis, this tenth day of April, 1989.

/s/ Robert J. Baer
ROBERT J. BAER
President

/s/ William H. Young
WILLIAM H. YOUNG
Treasurer

/s/ John J. Frank
JOHN J. FRANK
Vice-President

/s/ Vincent C. Schoemehl, Jr.
VINCENT C. SCHOEMEHL, JR.
Mayor

/s/ James E. Mosbacher
JAMES E. MOSBACHER
Purchasing Member

/s/ Jesse Horstman
JESSE HORSTMAN
Secretary to the Board

A STATEMENT OF THE VALUE OF HUMAN LIFE

The primary responsibility of this Department and each of its members is to protect the lives of the citizens we are sworn to serve. It is also the duty of each member of the Department to honor the established principles of democracy upon which this country was founded. Among these is the most profound reverence for human life, the value of which far exceeds that of any property. In view of this, it is essential that every action of this Department and of each of its members be consistent with that responsibility.

For these reasons, it is appropriate that this Statement on the Value of Human Life preface this Police Manual, which embodies the spirit of the Department and sets forth the principles and policies which guide the conduct of every Department employee.

In recognition, therefore, of the commitment of this Department to the preservation of human life, and because of the public trust which empowers sworn police officers to lawfully exercise force, even deadly force when required, in carrying out that commitment, it is hereby declared to be the policy of this Department that: (1) the use of deadly force shall never be condoned as a routine response, and (2) police officers shall exercise the highest degree of care in the application of such forces.

NOTE

Masculine pronouns used in this Manual include corresponding feminine pronouns unless otherwise indicated or qualified by the text.

The fact this this Department employs both male and female police officers will be clearly set out in the Manual wherever the ordinary collective wording is inapplicable or inadequate.

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Issued: April 4, 1991
Effective: Immediately

RULE 7

COMPLAINT AND DISCIPLINARY PROCEDURES

Section 7.001 Department Policy—The purpose of this rule is to establish a system of complaint and disciplinary procedures which will maintain the integrity of the Department by insuring a prompt and fair disposition of complaints. The procedures will subject the Department member to corrective action if improper conduct is evident, and will protect those who discharge their duties properly.

7.002 Applicability—The procedures apply to all commisioned members of the Department and, where applicable, to civilian employees.

7.003 Scope of the Rule—The provisions of this rule shall apply to complaints from the following sources:

(a) Those complaints reported to supervisory officers by members of the Department.

(b) Those resulting from observation by supervisory or commanding officers.

(c) Those made, reported, filed by private citizens or citizen groups.

(d) Those referred to the Department by any person or agency.

(e) Those uncovered during the course of a complaint investigation.

(f) Those made in lawsuits or during the course of litigation.

Section 7.004 Standards of Conduct—A member of the Department shall be subject to disciplinary action for the violation of the rules of conduct set forth by the Department as herein, for the violation of other rules and regulations set out in the Manual, for the violation of Special Orders, and for violation of the orders of a superior officer.

Every member of the Department shall, at all times, maintain reasonable standards of courtesy in their relations with the public and with other members of the Department and shall conduct themselves in such a manner that no discredit will be brought upon the Department in general or themselves in particular.

Acts contrary to good conduct shall include, but not be limited to, the following:

(a) Conviction of a felony, misdemeanor or ordinance violation under any statute or ordinance.

(b) Use of controlled substances not medicinally prescribed.

(c) Any conduct unbecoming to a member which is contrary to the good order and discipline of the Department. For example, shall include, but not be limited to:

(1) a Department member shall not withdraw or resign or absent himself from duty without leave, or fail to report for duty at his regularly appointed time;

(2) neglect of duty, improper performance of duty, sleeping or loafing while on duty to;

(3) failure to obey a reasonable order of a superior officer to;

(4) no insubordination or disrepect toward a superior officer to; and

(5) no superior shall abuse, in any manner a subordinate.

(d) Any conduct detrimental to the public peace or welfare.

(e) The drinking or alcoholic beverages of any kind, while on duty, or while in any part of the uniform which would readily identify the individual as a

member of the Metropolitan Police Department. Failure to notify supervisor or commander, when reporting for duty, or any recent use or ingestion of potentially behavior influencing prescription material or other medication.

(f) Borrowing, obtaining, receiving, soliciting or accepting any money, securities, property, or other valuable thing or any credit or guarantee of credit either directly or indirectly from any person under investigation or against whom a complaint has been made or an arrest warrant has been issued, any person in official custody or free on bond or any relatives or employees of such persons.

(g) Initiating, making, or filing a third party claim, suit, or other action arising out of work related injury, in the attempt to obtain, collect, or receive any money, securities, property, or other valuable thing from any person or company without first having notified the Department's Medical/Benefit Office.

(h) In dealing with the public - advising, procuring, or in any other manner seeking to solicit the employment of any attorney to prosecute or defend a civil suit or defend criminal proceedings.

(i) Using an official position for personal gain.

(j) When not on duty, and absent from place of residence for a period exceeding forty-eight hours without first having notified the commanding officer and provided information sufficient to permit emergency contact.

(k) Changing place of residence and/or telephone number without notifying commanding officer within twenty-four hours after the change.

(l) Soliciting or accepting the aid of any person or knowingly permitting any person to influence hiring, promotion or transfer on the member's behalf, except

by established procedures relating to request for transfer.

(m) Failing to notify unit commander prior to the appointed time to report for duty when reporting sick or injured; or when leaving place or residence or confinement while on the sick list except for medical treatment or approved therapeutic exercise. The recommendation for limited duty or rehabilitation activity must be approved by the office of the Chief of Police prior to engaging in therapeutic exercise.

(n) Failing to promptly report notification (by Healthline, St. Louis University Hospital or private physician) of one's ability to return to duty, to his commanding officer or acting commanding officer, and report at the earliest normal time that he is scheduled for duty.

(o) Feigning illness or excessive undocumented illness (outlined in the "Sick Reporting and Medical Procedure" special order) shall be subject to disciplinary action and commanding officers are held responsible for assuring that members of their command, when reporting sick are making a true report of their condition.

(p) Receiving money, gifts, gratuities, rewards or compensation for services rendered or expenses incurred, except while engaged in secondary employment, without consent of the Board.

(q) Soliciting, collecting or receiving money or other things of value for charitable, gift or testimonial purposes, while in uniform or on duty, or when representing oneself as an employee of the St. Louis Police Department, without consent of the Board.

(r) Failing upon receipt of proper notice, to attend any trial, hearing, or proceeding before a court, board, bureau or tribunal of the United States, State of Missouri, or any subdivision thereof, or City of

St. Louis, and to remain in attendance thereon until the conclusion thereof or until excused by the person causing such an appearance.

(s) Failing to devote one's time and attention to the business of the Department during scheduled duty hours; or, engaging in any other business or calling while off-duty, without first obtaining written permission from the Chief of Police to engage in secondary employment.

(t) Personal acts, or causing or procuring any person other than a licensed attorney to interfere or to intercede personally or by communication with a member of the Board or another member of the Department in one's behalf while one is under suspension or under charges; interfering with, or improper conduct with, any person who may be a witness against one while under suspension or under charges, or interfering with or improper conduct with a witness, potential witness, or one in a position to appear in any capacity in any department hearing or proceeding.

(u) The wearing of the police uniform is restricted to the service of this Department on assigned duty, or when going to or from duty, unless otherwise authorized by the Chief of Police. Permission to wear the Department's police uniform while engaged in secondary employment must be approved by the Chief of Police. Non-duty activity (e.g., menial tasks, non-emergency simple manual labor) in uniform is inconsistent with the dignity associated with the uniform and is prohibited.

(v) Any civilian member failing to immediately notify the Internal Affairs Division, or the Command Post if no one is on duty at the Internal Affairs Division, of any misconduct, physical or verbal, against any citizen by another member of the department.

(w) Any commissioned member failing to take appropriate action to prevent any misconduct, physical or verbal, against any citizen by another member of the department and then failing to immediately notify the Internal Affairs Division, or the Command Post if no one is on duty at the Internal Affairs Division, of the misconduct.

(x) Accepting anything of value for permitting/ ignoring illegal acts.

(y) Soliciting for attorneys, bondsmen, or other business persons for personal gain.

(z) Engaging in a strike, other work stoppage, work slowdown, or other job action against the Department, with the exception of non-violent, informational picketing.

(aa) Knowingly associating, on or off duty, with convicted criminals or lawbreakers under circumstances which could bring discredit upon the Department or impair an officer in the performance of his duty.

(bb) Receiving discipline, imposed as the result of complaint investigations, five (5) times in a three (3) year period.

(cc) Failing to take appropriate action on or off duty, when an incident requiring police action comes to the attention of a police officer.

(dd) Failing to conduct a proper investigation of suspected criminal activity or a non-criminal incident which requires police action.

(ee) Permitting a prisoner to escape through carelessness or neglect.

(ff) Failing to acknowledge a radio call or; to respond to a dispatched call for service.

(gg) Failing to follow radio procedure.

(hh) Suspension/revocation of driver's license; failing to notify superior/supervisor of suspension/revocation.

(ii) Failing to promptly report to the Legal Division any legal service in a lawsuit which resulted from official acts or conduct.

(jj) Engaging in any conduct or act, on or off duty, which could bring discredit upon the Department or its personnel.

(kk) Failing to properly exercise the duties and functions associated with an individual's rank or position.

(ll) Electronically recording the conversation of another Department member or a member of the public without that person's prior knowledge unless otherwise approved by other rules, regulations or special orders, or unless done in conjunction with a sanctioned investigation in which the said surreptitious recording is specifically authorized and approved in advance of the recording by the Board, the Chief of Police, a Deputy Chief or the Internal Affairs Division.

(mm) Failing or refusal to qualify with a Department owned/approved firearm.

Refer also to Rule 9: General Duty Regulations.

7.005 Political Activity—The purpose of this Rule is to set forth the permissible limits within which the members of this Department, commissioned and civilian, may participate in the elective process of any level of government and engage in political activity. It is intended to give Department members the limited right to engage in political activity consistent with the primary objective of preventing any real or apparent misuse or abuse of a posi-

tion within the Department in the area of political activities and in the exercise of the right of suffrage.

(a) Permissible Activity—

(1) All members of this Department are free to engage in political activity in the widest extent consistent with the restrictions imposed by law and Rule 7.005. Each member retains the right to:

a) register and vote in any election.

b) express his opinion as an individual on political subjects and candidates. The expression of an opinion by a Department member regarding a political candidate through the medium of distributing handbills is permitted, provided said Department member does not represent himself to be a member of the Department, any police organization or to be expressing the views of the Department as a whole; any police officer engaged in such activity must be off duty and in civilian attire.

c) display a yard sign or; on or about his person a political picture, sticker, badge or button or political symbol except during the time for which compensation is received as a member of the Department and whenever in uniform identifying him as a member of this Department;

d) participate in the non-partisan activities of a civic community, social, labor, or professional organization, or of a similar organization;

e) be a member of a political party or other political organization, and participate in its activities to the extent consistent with law and Rule 7.005;

f) attend a political convention, rally, fund-raising function, or other political gathering;

g) sign a political petition as an individual;

h) make a financial contribution to a political party or organization;

i) take an active part as an independent candidate or in support of, or opposition to, an independent candidate, in a partisan election provided that before taking any such part as aforesaid the member shall resign his position in the Department, or with the consent of the Board of Police Commissioners in its sole discretion, take a leave of absence as to the position;

j) be politically active in connection with a question which is not specifically identified with a political party, such as a constitutional amendment, referendum, approval of a municipal ordinance or any other question or issue of a similar character;

k) otherwise participate fully in public affairs, except as prohibited by law or Rule 7.012, in a manner which does not materially compromise his efficiency or integrity as a member of this Department or the neutrality, efficiency, integrity of this Department.

(2) Paragraph (a)(1) of Rule 7.005 does not authorize a member of this Department to engage in any political activity while on duty for which compensation is being paid, or while in uniform that identifies him as a member of this

Department. The Chief of Police may prohibit or limit the participation of a member or class of members of this Department in an activity permitted by said Paragraph (a)(1) if participation in the activity would interfere with the efficient performance of official duties, or create a conflict or apparent conflict of interests.

(b) Use of Official Authority. Prohibition—A member of this Department may not use his official authority, position or influence for the purpose of interfering with or affecting the result of an election.

(c) Political Management and Political Campaigning; Prohibition—

(1) A member of this Department may not take an active part in political management or in a political campaign, except as permitted in Rule 7.005.

(2) Activities prohibited by Paragraph (c)(1) of this section include but are not limited to:

a) serving as an officer of a political party, a member of a national, state or local committee of a political party, an officer or member of a committee of a political club, or being a candidate for any of these positions;

b) organizing or reorganizing a political party organization or political club;

c) directly or indirectly soliciting, receiving, collecting, handling, disbursing, or accounting for assessments, contributions, or other funds for a political purpose;

d) organizing, selling tickets to, promoting, or actively participating in a fundraising activity of a political candidate, political party or political club;

e) taking an active part in managing the political campaign of a candidate for public office or political party office;

f) becoming a candidate for, or campaigning for, an elective public office;

g) soliciting votes in support of or in opposition to a candidate for public office or political party office;

h) acting as recorder, watcher, challenger, or similar officer at the polls on behalf of a political party or candidate;

i) driving voters to the polls on behalf of a political party or candidate;

j) endorsing or opposing a candidate for public office or political party office in a political advertisement, a broadcast, campaign literature or similar material;

k) serving as a delegate, alternate or proxy to a political party or convention;

l) addressing a convention, caucus, rally or similar gathering of a political party in support of or in opposition to a candidate for public office or political party office.

(d) Determination of Questioned Activities—Appeal—

(1) A member of this Department may request, in advance, that a determination be made whether a given activity is permitted or prohibited. The request shall be made in writing and shall clearly set forth all the facts pertaining to, or connected with, activity in which the member wishes to engage. The request shall be directed to the Chief of Police (or the person designated by the Board).

(2) A written determination shall be made and delivered to the member making such request no later than thirty (30) days after receipt of such request.

(3) A member aggrieved by such a determination may appeal to the Board within ten (10) days after receipt of the determination. The appeal shall be in writing and shall clearly set forth the reason why the determination is alleged to be incorrect.

(4) The decision of the Board based on the record made in the hearing held on such appeal shall be a final decision and binding on all parties.

7.006 Complaint Defined—A complaint is defined as an allegation that a Department member has violated a Department rule or regulation, or a federal or state statute, or a city ordinance.

7.007 Procedure of Accepting Citizen Complaints

(a) A complaint may be filed in person, in writing, or by telephone to the Department, the Internal Affairs Division, or the Command Post in the office of the Chief of Police. At the time of filing the complaint, or at anytime thereafter, any citizen may be accompanied by counsel or by an interested observer to assist in the filing.

(b) Any Department member who receives a complaint from a citizen shall

(1) obtain information including the nature of the alleged violation, the name, address, and telephone number of the complainant, and the name of the Department member involved;

(2) notify his supervisor;

(3) make arrangements for the complainant to appear personally at the Internal Affairs Division. If necessary, transportation shall be provided, see (c) below;

(4) notify the Internal Affairs Division, providing the information required in (1) above. If no one is on duty in the Internal Affairs Division, the Command Post shall be notified.

(c) Whenever possible, the complainant shall be required to appear personally at the Internal Affairs Division.

(d) If it is not feasible for the complainant to personally appear at the Internal Affairs Division at the time he lodges his complaint, it shall be the responsibility of the Department member receiving the complaint to complete the "Allegation of Employee Misconduct Report." Members of the Department below the rank of sergeant shall have the report completed by their supervisor. Upon completion, this form shall be hand carried to the Internal Affairs Division. It shall be the responsibility of the Internal Affairs Division to supplement the report with any additional information when the complainant personally appears.

(e) If the complainant appears personally at the Internal Affairs Division, it shall be the responsibility of that office to complete the "Allegation of Employee Misconduct Report."

(f) Complaints received by telephone, and complaints received in writing shall be referred immediately to the Internal Affairs Division and the "Allegation of Employee Misconduct Report" shall be completed.

(g) Under no circumstances shall a telephone complaint be referred by the Department member re-

ceiving the complaint to the district where the complainant resides or to the district where the violation is alleged to have occurred.

7.008 Referral of Complaint—All complaints initiated by a citizen, or any alleged criminal violation, must be immediately referred to the Internal Affairs Division. Serious violations of departmental rules shall also be immediately referred to the Internal Affairs Division. In all instances, the "Allegation of Employee Misconduct Report" must be completed. The Internal Affairs Division shall maintain a bound ledger of these complaints, and each complaint received shall be assigned a number.

Less serious transgressions of departmental rules, or less serious complaints shall not be immediately referred to the Internal Affairs Division. Normal investigative procedures shall be followed. If the initial investigation reveals that an allegation will be made against an employee, then the "Allegation of Employee Misconduct Report" shall be prepared, with the investigating commander submitting a report and recommendations, through the proper chain of command, for final disposition.

Complaints which deal solely with differences of opinion between an officer and a citizen over the issuance of a traffic ticket, or summons, not involving an allegation of violation of departmental rules or an allegation of a law violation against the officer, nor involving an allegation such as harassment against the officer, should not be considered complaints, but rather a difference of opinion. These matters, therefore, should not be investigated nor should an "Allegation of Employee Misconduct Report" be prepared. These matters should be resolved in court. The citizen can exercise his right to challenge the traffic ticket, or summons, by appearing in court and entering a plea of "not guilty". Both the officer and the citizen will then present their respective testimony to the Judge, who will rule on the matter.

7.009 Complaints Alleging Criminal Violation—If the complaint alleges a violation of the criminal law, or if during the investigation, evidence is obtained to support a criminal violation, the Internal Affairs Division shall immediately notify the Deputy Chief, Bureau of Administration. If there is probable cause to believe that a Department member has committed a criminal violation, the Deputy Chief, Bureau of Administration shall cause a criminal investigation to be initiated.

7.010 Authority and Responsibilities—Each member of the Department shall perform the duties and assume the obligation of his rank in the investigation of complaints or allegations of misconduct. Supervisory and command personnel will themselves initiate investigations when the person complained of or observed in an infraction is within the scope of their authority.

7.011 Duties of Deputy Chief, Bureau of Administration—Complaints

(a) Upon receipt of a complaint, the Deputy Chief, Bureau of Administration may, at his discretion;

(1) refer it to an appropriate command; or

(2) make a preliminary investigation and then assign it to an appropriate command to complete the investigation based upon the preliminary; or

(3) cause an investigation of the complaint by Internal Affairs Division.

(b) The Internal Affairs Division shall have sole responsibility for proceeding with serious complaints and serious violations of Departmental rules and regulations, unless another designation of responsibility is made by the Chief of Police or Board.

(c) As indicated, the Internal Affairs Division shall complete the "Allegation of Employee Misconduct

Report" whenever a complaint is received, unless this report has previously been completed by a Department member.

(d) The Internal Affairs Division shall notify each complainant in writing that his complaint has been received and that he will be advised of the outcome in writing.

(e) The Internal Affairs Division will conduct an investigation at the request of any Department member who feels threatened by a false accusation on a contrived situation involving false evidence against the Department member. Any Department member may report such a situation directly to the Internal Affairs Division unless it involved a member of the Internal Affairs Division, in which case the Deputy Chief, Bureau of Administration will designate by whom and what manner an investigation will be conducted.

(f) Any Department member upon whom a complaint has been filed, and any Department member who has been suspended, shall be notified immediately in writing of the circumstances of the complaint and the name of the complainant, if known. The Department member's immediate supervisor will also be notified. If the nature of the complaint is such that the Department member's knowledge of same would impede the investigation, the Department member need not be notified immediately.

7.012 Power to Suspend—

The power to suspend, vested by State Statute in the Board of Police Commissioners is hereby delegated to officers of command rank, including acting command rank.

7.013 Administrative Suspension—

A member of the Department may be placed on administrative suspension if unfit for duty or when there is evidence of serious misconduct reflecting upon the integrity of the individual or the Department and the nature of the misconduct necessarily requires immediate relief from duties. Additionally, a member shall be placed on administrative suspension pursuant to the provisions of RSMo. 84.120 in the event a felony indictment is issued against the member.

Except when the administrative suspension is by the Chief of Police or the Board of Police Commissioners, it must be reported immediately to the Chief for his approval; the Chief has the authority to set aside such administrative suspension and restore the member to duty.

While under administrative suspension, a member shall surrender all Department property in his possession to his commander, upon such demand. If uniformed, the uniform or insignia of rank may not be worn. In cases where a commissioned officer owns his personal revolver, the privilege of carrying the weapon is revoked during a period of administrative suspension and the officer shall be so warned.

A member of the Department under administrative suspension shall obey all reasonable rules, regulations, and orders not in direct conflict with his rights as an accused.

A member of the Department under suspension shall receive no salary, holidays, vacation, recreation days, nor any other benefits including payment for health and life insurance premiums for the period of the suspension. However, as soon as the Chief of Police has authorized the suspension to continue, a suspended member will be allowed to make application to receive payment for accrued overtime and earned vacation days. Payments for

accrued overtime and earned vacation days will occur on the Department's regular bi-weekly pay dates and no one payment may exceed the suspended member's regular bi-weekly compensation. In addition, suspended members will be allowed to make payments for their health insurance premiums. At the conclusion of the matter the Board has the authority to order such withheld compensations restored to the member for the suspension period.

7.014 Proceedings of Administrative Suspensions Upheld by the Chief of Police—If the suspension of a commissioned member is upheld by the Chief of Police, the Deputy Chief, Bureau of Administration, shall set a date and time for a meeting of a Suspension Advisory Committee and shall notify all concerned persons. The Suspension Advisory Committee shall consist of a police officer, a sergeant and a command rank officer, and three (3) alternates of equivalent rank who shall serve for a period of four (4) months. When a Suspension Advisory Committee member is unable to attend a meeting, an alternate of equivalent rank shall serve in place. Members of the Internal Affairs Division shall not serve on the Suspension Advisory Committee, nor shall persons assigned to the same district or division as the suspended member. The Secretary to the Board of Police Commissioners shall make the appointments to the Suspension Advisory Committee from officers of the rank of police officer through lieutenant colonel and in its discretion shall appoint such additional members as are required. No officer may serve on this committee more than once in a one-year period.

The Suspension Advisory Committe shall convene no later than forty-eight hours after the original suspension. It shall be the duty and function of the committee to review the facts and circumstances giving rise to the suspension. The proceedings shall be closed and informal and the committee may call upon any department member to submit oral testimony or a written report. The suspended

member may submit any information deemed appropriate; however, he shall not be required to submit evidence directly to the committee. The suspended member may be represented by counsel if he so chooses.

Within twenty-four hours following its meeting, the committee shall submit brief written findings of fact and recommendation to the Chief. If the committee finds that there is substantial evidence of misconduct of a type which warrants relieving the member of duty, or that the member is unfit for duty, it shall recommend that the member remain in suspended status until final disposition by the Board of Police Commissioners. The committee shall consider whether continued active employment would tend to bring the Department into disrepute or would reflect discredit upon, or impair the operation of the Department. If the committee recommends that the suspension be lifted, it shall make any recommendation concerning assignment or transfer which it deems appropriate.

Upon receipt of the Suspension Advisory Committee's findings and recomendation, the Chief of Police shall within twenty-four hours either authorize the suspension to continue or make any other order deemed appropriate.

If the Chief of Police orders the suspension to remain in effect, the suspended member shall be served with charges and specifications with twenty-four hours following the Chief's order, and the Chief shall report the suspension at the next meeting of the Board of Police Commissioners.

The matter shall be set for a hearing before the Board of Police Commissioners within thirty days from the original date of the suspension. The suspended member or the Internal Affairs Division may, for good cause shown, petition the Board for a continuance. The Board of Police Commisioners shall render its order within 45 days from the time that the record of the proceedings and the proposed findings of facts and conclusion of law and the

recommendations of the hearing officer are made available to the Board. In the event the Board fails to render a decision within said 45 days, the suspended member will automatically be reinstated in an administrative capacity without police powers, unless within said 45 days the Board shall extend the period for decision for a definite time and for good cause. Both the time of the extension and the reason therefore shall be announced in writing and made available to the officer. Investigations concerning Department members under suspension shall be expedited and brought to a conclusion at the earliest possible time.

This procedure does not apply to disciplinary suspensions imposed as a result of disciplinary action ordered by the Board of Police Commissioners.

7.015 Conduct of Investigations—Preliminary Considerations—

(a) Citizen complaints reduced to writing on the "Allegation of Employee Misconduct Report" and signed by the complaint will be invesitgated. In some cases a Department member or member's supervisor may be the person making the allegation in writing. Complainants and the accused employee will be provided with a completed copy of this report.

(b) Oral complaints, anonymous telephone complaints, and unsigned letters will be referred to the Internal Affairs Division. An "Allegation of Employee Misconduct Report" will not be immediately prepared. Instead, the Internal Affairs Division will conduct a preliminary investigation to determine if there exists sufficient evidence to warrant further investigation. When such evidence, or the likelihood of a possible procedural violation is established, at that point the "Allegation of Employee Misconduct Report" will be prepared and established procedures followed in the matters of investigation, report and

recommendation. On the other hand, if the preliminary investigation reveals that the information provided by such anonymous telephone call or unsigned letter does not merit nor warrant formal investigation, the information will, with the approval of the Deputy Chief, Bureau of Administration, be filed in a pertinent information file, and no further action will be taken, unless at a later date, additional information is forthcoming to strengthen the original information and/or justify a formal investigation being conducted.

(c) If a complaint alleges a violation of the criminal law, or if during the internal investigation, evidence is obtained to support a criminal violation, the member under investigation (prior to said member being questioned) shall be immediately advised of his rights under Miranda. The member shall also be advised that he may be required to answer questions relating to his departmental duties, under penalty of dismissal or other action, even though there is a criminal aspect of the case.

If a statement is obtained after a member has been advised of and waived his rights, it shall be included in both the internal investigation report and the criminal offense report.

If a member refuses to waive his constitutional rights, he shall thereafter be advised that he must answer questions relating to his departmental duties for purposes of the internal investigation, and if he fails to do so he can be dismissed or receive other disciplinary action for failing to do so. In the event he thereafter makes a statement after refusing to waive his Miranda rights, that statement shall not be used against him in any criminal prosecution, however, the statement will be included in the internal investigative report.

* * Deletion

(d) A Department member may have counsel present when being questioned with respect to a complaint if the Department member: 1) is the subject of a written Allegation of Employee Misconduct; 2) is specifically named in a complaint and is being questioned in order to determine whether an Allegation of Employee Misconduct should be filed against him, and/or; 3) if the focus of an investigation has turned upon said Department member and consideration is being given to filing an Allegation of Employee Misconduct against said Department member.

(e) The Internal Affairs Division may require an accused Department member to submit to reasonable physical or psychological tests for purposes of determining fitness to perform duties or whether there has been a violation of rules. Such physical tests may include blood or urinalysis tests, the results of which shall be used for Department disciplinary processes only, if necessary. The accused Department member may request such tests.

(f) At any time during the course of the investigation, the Department member the complainant, the attorney for either or any community representative may submit relevant evidence to the Internal Affairs Division and such information shall become part of the investigation and shall be investigated.

(g) If a complainant withdraws his complaint, the investigating unit may, with the approval of the Deputy Chief, Bureau of Administration, cease the investigation. Reports concerning withdrawn complaints shall include the investigating officer's opinion, or the complainant's explanation for withdrawing the complaint.

(h) If the investigation reveals that the complaint was made maliciously, in bad faith, or with knowledge that the accusation was false, steps shall be

taken, whenever possible, to prosecute the complainant for making a false report of a law violation.

(i) Internal investigations shall proceed without delay, even though there is a criminal investigation or civil litigation to the case and if necessary, an offense report shall be prepared in conjunction with the investigation. If there is a pending criminal investigation or civil litigation, final reports of complaints or commencement of hearings will be delayed only at the request of the prosecutor or Board of Police Commissioners. In those cases where criminal action or civil litigation is pending the Inspector of Police, Bureau of Administration shall advise the appropriate prosecutor or Legal Division when the final report is completed and ready for submission to the Chief of Police.

(j) In the event an employee resigns/retires while under investigation, the investigative report will be completed. The report will be submitted to the Board of Police Commissioners documenting the allegations, findings and recommendation(s).

7.016 Classification of Complaint Investigation Reports—Each forwarded complaint investigative report shall specify the allegation(s) which are to be classified in one of the following five categories:

(a) *Unfounded.* The complaint was not based on fact, as shown by the investigation, or the incident complaint of did not occur.

(b) *Exonerated.* The action complained of did occur, but the investigation disclosed that the actions were reasonable, lawful and proper.

(c) *Complaint Withdrawn.* Complainant withdrew complaint.

(d) *Not Sustained.* Insufficient evidence available to either prove or disprove the allegations in the complaint.

(e) *Sustained*. Investigation disclosed sufficient evidence to support the allegations in the complaint.

In any instance when a complaint is finally disposed of as "Unfounded", "Exonerated", or "Complaint Withdrawn", all records pertaining to the complaint and its disposition shall be expunged.

7.017 Administration of Discipline—The Board has the poser and authority to discipline, for cause, any member of the Department by dismissal, suspension, reduction in rank, written reprimand, or other appropriate action.

Definitions as used in this rule:

(a) *Disciplinary Leave*—Leave without pay as the result of disciplinary action imposed by, or with the authority of, the Board of Police Commissioners. The authority imposing the disciplinary action does not deem that the complaint investigation revealed evidence of serious misconduct reflecting upon the integrity of the individual or the Department and therefore does not find it necessary to have the member surrender his/her Department weapon and badge.

(b) *Disciplinary Suspension*—Leave without pay as the result of disciplinary action imposed by, or with the authority of the Board of Police Commissioners. The authority imposing the disciplinary action deems that the complaint investigation revealed evidence of serious misconduct reflecting upon the integrity of the individual or the Department and therefore, find it necessary to have the member surrender his/her Department weapon and badge for the period of the suspension.

Included in the range of recommended disciplinary action are: reinstruction; oral reprimand; written reprimand; disciplinary leave (without pay); disciplinary suspension (without pay); reduction in rank; dismissal.

Discipline shall be administered through complaint investigations reported via administrative reports, with recommendations, except for written reprimand or lesser punishment recommended by the Department Accident Review Board.

Complaint Investigation Reports completed by Commands Other Than Internal Affairs Division

Complaint investigation reports completed by commands, other than the Internal Affairs Division will be, immediately upon completion, submitted to the Internal Affairs Division, where the reports will be reviewed for content and completeness. Prior to submitting a report to the Internal Affairs Division, commanders will confer with their Area Major/Deputy Bureau Commander and Bureau Commander concerning the report's contents. This fact will be included in the report.

The Internal Affairs Division shall return all complaint investigation reports which contain recommended discipline of reinstruction; oral reprimand; written reprimand; 1 to 15 days disciplinary leave; or 1 to 15 days disciplinary suspension to the commander of the concerned member to administer the discipline.

The Internal Affairs Division shall forward all complaint investigation reports which contain recommended discipline of 16 or more days disciplinary leave; 16 or more days disciplinary suspension; reduction in rank; or dismissal to the Chief of Police for review and recommendation. When the Chief of police has formulated his recommendation, he shall forward the complaint investigation report, along with his recommendations, to the Internal Affairs Division, through the Deputy Chief, Bureau of Administration. The Internal Affairs Division shall administer the discipline when the recommendation of the Chief of Police is 16 or more days disciplinary leave; 16 or more days disciplinary suspension; reduction

in rank; or dismissal. If the recommendation of the Chief of Police is for less than 16 days disciplinary leave or disciplinary suspension, the Internal Affairs Division shall forward the complaint investigation report to the commander of the concerned member to administer the discipline.

The Chief of Police may, at his discretion, recommend no specific disciplinary action, but recommend instead that the involved person be afforded a trial before the Board of Police Commissioners on the charge and that the Board determine the appropriate disciplinary action. The Board shall retain the prerogative of requiring the chief of Police to make a recommendation.

Complaint Investigation Reports Completed by the Internal Affairs Division

Complaint investigation reports completed by the Internal Affairs Division will be, immediately upon completion, submitted by the commander of the Internal Affairs Division to the Deputy Chief, Bureau of Administration who will review the reports for content and completeness.

The Deputy Chief, Bureau of Administration, shall return complaint investigation reports which contain recommended discipline of reinstruction; oral reprimand; written reprimand; 1 to 15 days disciplinary leave; or 1 to 15 days disciplinary suspension, to the Internal Affairs Division Commander. The Internal Affairs Division commander shall forward the complaint investigation report to the commander of the concerned member to administer the discipline.

The Deputy Chief, Bureau of Administration, shall forward complaint investigation reports which contain recommended discipline of 16 or more days disciplinary leave; 16 or more days disciplinary suspension; reduction

in rank; or dismissal to the Chief of Police for review and recommendation. When the Chief of Police has formulated his recommendation, he shall forward the complaint investigation report, along with his recommendations, to the Internal Affairs Division, through the Deputy Chief, Bureau of Administration.

If the recommendation of the Chief of Police is 16 or more days disciplinary leave; 16 or more days disciplinary suspension; reduction in rank; or dismissal, the Internal Affairs Division commander shall administer the discipline.

The Chief of Police, may at his discretion, recommend no specific disciplinary action, but recommend instead that the involved person be afforded a trial before the Board of Police Commissioners on the charge and that the Board determine the appropriate disciplinary action. The Board shall retain the prerogative of requiring the Chief of Police to make a recommendation.

ADMINISTERING DISCIPLINE

Commander of Involved Member

When the recommendation for discipline is reinstruction; oral reprimand; or written reprimand, the commander of the officer in question shall immediately notify the member, impose the discipline and document this fact in a memorandum. The memorandum, stating that the discipline has been administered, will become a part of the complaint investigation report, which shall be submitted, through the chain of command, to the Chief of Police. The Chief of Police shall forward the complaint investigation report to the Internal Affairs Division, through the Deputy Chief, Bureau of Administration.

When a recommendation is made for 1 to 15 days disciplinary leave or disciplinary suspension, the commander of the officer in question shall immediately notify the member of the recommended discipline. The member will

have five (5) working days to make a decision as to whether to accept the recommended discipline or request a Summary Hearing. The member's commander will prepare a Consent to Accept Recommended Discipline or Request for Summary Hearing form on which the member will indicate his/her option of either accepting the recommended discipline or requesting a Summary Hearing. If the member accepts the recommended discipline, his commander shall immediately administer the discipline and prepare a memorandum of this fact. The memorandum shall become a part of the complaint investigation report, which will be submitted through the chain of command to the Chief of Police. The Chief of Police shall forward the complaint investigation report to the Internal Affairs Division, through the Deputy Chief, Bureau of Administration. If the member requests a Summary Hearing his commander shall immediately notify the Internal Affairs Division that a Summary Hearing has been requested. The Internal Affairs division shall notify the Summary Hearing Board that a hearing has been requested.

Internal Affairs Division

When the proposed recommendation of the Chief of Police for discipline is 16 or more days disciplinary leave or disciplinary suspension or reduction in rank, the Internal Affairs Division shall give the member an opportunity to accept it by signing a Consent to Accept and Waiver of Hearing Form, which will become a part of the complaint investigation report. The provisions of the waiver are contingent upon subsequent approval by the Board. Whenever a member declines to accept the recommended discipline, the Board will be informed of the need for a Board Hearing.

When the proposed recommendation is for dismissal, a waiver will not be applicable and the involved member will have the option of a Board Hearing or termination of employment with the Department. When the disciplinary action is a recommendation for dismissal and the involved member rejects the option of termination, the Board will be informed of the need for a Board Hearing.

When the recommendation of the Chief of Police is that the involved person be afforded a trial before the Board to determine the appropriate disciplinary action, the Internal Affairs Division shall so notify the member. In such instances, the involved member will not be afforded the opportunity to sign a waiver, but will be served the appropriate charges and specifications in the prescribed manner.

In all discipline cases involving commissioned members of the rank of Captain or above, wherein the recommended discipline is greater than a written reprimand, and the affected member does not waive a hearing, those cases shall be referred to the Board for a hearing as outlined above.

7.018 Hearings—Under Missouri law, the Board of Police Commissioners is vested with exclusive authority to hear and render decisions at Board hearings. The Board is entitled by law to delegate the hearing authority to a non-board member.

Summary Hearings—

A Summary Hearing Board shall consist of a major (who shall be chairman of the board); one member a rank above the accused officer and one member of the same rank as the accused officer. Members of a hearing board shall be appointed by the chief of Police from a list of officers who have volunteered to serve. No officer can serve longer than six months in a calendar year. Officers assigned to the Internal Affairs Division may not serve on a Summary Hearing Board.

When the Summary Hearing Board is notified, in writing, that a member has requested a hearing, a hearing will be set within ten (10) working days.

The Summary Hearing Board may, upon application of the accused or the Department representative, postpone the hearing for good cause shown. Each side shall receive only one such continuance, which shall not exceed two (2) weeks.

The proceedings of a Summary Hearing Board will be informal, however the hearing will be electronically recorded for later transcription were it to become necessary.

The member requesting the hearing may be represented by counsel. The Department will be represented by the commander who made the initial recommendation for discipline.

The accused member and the Department representative shall present the facts of the case in their behalf. Witnesses may be heard and evidence and reports introduced and reviewed. The chairman of the board shall rule on the admissibility of evidence and testimony.

At least two (2) members of the hearing board must vote for a finding of sustaining the original allegations.

The hearing board may affirm, increase (up to a maximum of 15 days) or decrease the recommended discipline or may require that a full hearing by the Board of Police Commissioners be held.

The Summary Hearing Board shall prepare the Findings of Fact and Conclusions of Law within one (1) week after the conclusion of the hearing.

The Summary Hearing Board shall notify the accused member of its finding within seventy two (72) hours after recording its Findings of Fact and Conclusions of Law.

The findings of the Summary Hearing Board are final. There shall be no appeal within the Department.

The Summary Hearing Board shall notify the Chief of Police of its findings and conclusions.

Board Hearings—

All Hearings shall be conducted by one or more members of the Board, or by a Hearing Officer and one or more members of the Board. Hearings shall be open to the public, and shall be conducted in accordance with the provisions of Chapter 536, revised Statutes of Missouri, regarding contested cases.

The Board shall select a panel of hearing officers who shall be assigned to conduct hearings on a random basis. Hearing officers shall be practicing attorneys licensed to practice law in the State of Missouri.

At least ten days prior to time set for the hearing, a copy of the Charges and Specifications, together with a subpoena designating the time and place for hearing shall be served on the accused.

A charge is defined as a specific offense alleged to have been committed by the accused. Each distinct offense shall be the subject of a separate charge. Several charges against the same accused may be included in one paper and shall be numbered consecutively, the paper setting out the charge or charges shall be signed by the Chief of Police in the case of a Board Hearing, or by the citizen complainant, in the case of a Citizen Appeal Hearing. Each charge, with its specifications, shall be complete in itself and shall not refer, for facts or particulars, to another charge or specification.

A specification is defined as the statement of specific facts upon which a charge is based. Such statement shall be in plain and concise language, giving the name and rank of the accused, the time and place of the alleged offense and the circumstances relating hereto. The specifications shall be numbered consecutively.

In the case of a Board Hearing, no charge shall be preferred against a member of the Force unless there is good reason to believe that an offense has been committed by the accused and that it can be substantiated by evidence.

Service shall be made either by delivering such copy and subpoena to the accused in person or by leaving the same at his usual place of abode with some member of his family over the age of 15 years. If by reasonable diligence such service of the copy and subpoena cannot be made, the copy and subpoena shall be posted in a conspicuous place in the office of the unit of the Department to which the accused was last assigned.

Service may be made by any officer designated by the Chief of Police or the Board.

No accused shall be joined in the same charge or heard on joint charges with any other accused member of the Force unless for concerted action for the same offense. Each case shall be heard separately and upon its own merits.

The Board may, upon application of the accused or the complainant, postpone the hearing for good cause shown.

The Department member may be represented by counsel at no expense to the Department.

Subpoenas, when requested shall be issued to insure the presence of witnesses on behalf of the Department, the member who is charged, and the complainant.

Unless the accused's character and overall conduct are at issue and constitute the nature of the charge, the accused's service record and records of former hearings shall not be available for the hearing. However, in assessing discipline the Board may review and take into consideration the accused's service record and the proceedings in former hearings (sustained complaints only), and the Board shall make said service record a part of the official record and transcript of the hearing and shall certify to same.

If any accused member of the Force, being duly notified as provided herein, shall fail to appear for a hearing, a plea of Not Guilty shall be entered in his behalf. The Board shall then proceed summarily to hear the evidence and render judgment on the charges as the facts disclosed may warrant.

The accused shall be arraigned as to each charge in consecutive order, the presiding officer at the hearing causing each charge to be read to him and requiring him to plead Guilty or Not Guilty.

If the accused pleads Not Guilty, the witnesses for the prosecution shall first be called. The prosecution may call the Department member as a hostile witness during the prosecution's case. All the evidence for the prosecution shall be produced and presented before the prosecution rests. The accused shall then be permitted to call witnesses and present evidence in his own behalf. Evidence in rebuttal may then be introduced by the prosecution. Direct examination of each witness shall be followed by cross examination and redirect examination, if desired. The entire proceeding of the hearing will be transcribed. The Board may at its discretion, vary the order of proceedings and may reopen any issue before or after the case is closed on both sides.

If the accused pleads Guilty, the Board may receive such evidence as introduced by the accused, in mitigation of the offense charged, with the prosecution having rebuttal privileges.

At the time of the hearing, every witness, interpreter, and the stenographer reporting the proceedings, shall be sworn, taking the oaths respectively prescribed by law for each.

If the hearing is conducted by a Hearing Officer, he shall make recommended Findings of Fact and Conclusions of Law to the Board within 30 days after receiving the transcript of the proceedings.

Copies of the recommended findings of the Hearing Officer shall be provided to all parties. Upon receipt of the recommended findings, the Deputy Chief, Bureau of Administration, accused officer, and/or complainant shall have 15 days from receipt in which to file exceptions to the recommendations presented by the Hearing Officer.

If written exceptions are submitted, all parties shall be given copies of same. After review of the recommendations, submitted exceptions, if applicable, and the transcript of the proceedings, the Board shall render findings of fact and conclusions of law and enter its decision and order. The Judgment of the Board shall be final.

In the event that a Hearing Officer, for any reason, does not make recommended Findings of Fact to the Board within 30 days after receiving the transcript of the proceedings, the Board will review the transcript of the proceedings and shall render Findings of Fact and Conclusions of Law and enter its decision and order. The judgment of the Board shall be final.

An abstract of such judgment and findings shall be maintained by the Secretary to the Board. Findings of Fact and Conclusions of Law shall be prepared and provided to the accused.

7.019 Annual Summary—An annual summary of the results of complaint investigative reports shall be prepared by the Deputy Chief, Bureau of Administration, and submitted through the Chief of Police to the Board, for inclusion in the Annual Report of the Board. Such summary shall tabulate and furnish the statistical data relative to complaints received, classifications assigned, and disposition (see 2.552).

7.020 Citizen Appeals—If the proposed recommendation is that a complaint be classified "Exonerated", "Unfounded", or "Not Sustained", the complainant may, within twenty days of the mailing of the proposed recommendation, make objection in writing or by personally

appearing at the office of the Deputy Chief, Bureau of Administration.

If objection is made, the citizen shall consult with the Deputy Chief, Bureau of Administration in an attempt to reconcile any differences.

If the complainant remains unsatisfied, he may request further investigation.

The request for further investigation shall be considered an appeal by the complainant from the recommendation of the Chief of Police. This appeal shall be made in writing on a form furnished by the Department. The complainant shall state in writing any additional facts not previously submitted to the Department or not considered by the investigating unit in its investigation. Further, the complainant shall state his objections, if any, to the manner in which the complaint was investigated by the Internal Affairs Division.

The appeal and request for further investigation shall then be forwarded to the Secretary to the Board of Police Commissioners. The Secretary shall then determine whether the complainant has presented sufficient evidence not previously considered in the investigation or has shown that the complaint was not properly investigated. Should the Secretary determine that evidence necessary to prepare a complete and accurate report was not known or considered by the investigating unit or that the complaint was improperly conducted, then the Secretary shall order the Internal Affairs Division to reinvestigate the complainant's charges in light of the new evidence or inadequate report. If the Secretary determines there is no need for further investigation, the complainant shall be so notified.

The purpose of this procedure is to ensure a fair and impartial investigation of the complainant's charges based on all the information and facts known to the complainant.

7.021 Disciplinary Code—The Disciplinary Code which is contained on the following pages provides penal-

ties which are to be used when recommending or imposing disciplinary action. Penalties for manual violations not codified therein will be reprimand to dismissal.

The Board of Police Commissioners may in it's discretion increase the punishment set forth in the disciplinary code where the total disciplinary record of the accused reflects a course of conduct which has been contrary to the good order and discipline of the Department.

Revisions will be made to the Disciplinary code from time to time as the rules and regulations of the Police Manual are amended, revoked, or added to as circumstances or the good of the service may dictate.

Discipline to be imposed as the result of more than one sustained allegation shall be administered consecutively or concurrently, at the discretion of the Summary Hearing Board or the Board of Police Commissioners.

Manual/S.O. Reference	FINDING	PENALTY PROVIDED			Time Frame
		1st Offense	2nd Offense	3rd Offense	
7.004 (a)	Conviction of a Felony	Dismissal			
7.004 (a)	Conviction of a Misdemeanor	30 days to Dismissal	Dismissal		
7.004 (a)	Conviction of an Ordinance Violation	Reprimand to dismissal	30 days to dismissal		2 years
7.004 (x)	Accepting anything of value for permitting/ ignoring illegal acts	Dismissal			
7.004 (b)	Use of controlled substance not medically prescribed	Dismissal			
7.004 (c)	Intoxication—On Duty	30 days to dismissal	Dismissal		
7.004 (e)	Drinking alcoholic beverages while on duty, except within the scope of assignment	5 days to dismissal	16 days to dismissal		
7.004 (e)	Intoxication—off duty and in uniform	10 days to 30 days	30 days to dismissal	Dismissal	
7.004 (e)	Failure to notify supervisor at reporting for duty of recent use of potentially behavior influencing prescription or other medication	5 days to dismissal	10 days to dismissal	Dismissal	2 years

Manual/S.O. Reference	FINDING	PENALTY PROVIDED			
		1st Offense	2nd Offense	3rd Offense	Time Frame
7.004 (i)	Use of position for personal gain	Reprimand to dismissal			
7.004 (g)	Initiating or making/filing of claim/suit or other action, for work related injury in an effort to obtain/receive money or other item of value without notifying Personnel Section	Reprimand to 5 days	10 days to dismissal	Dismissal	
9.400	Violation of Department Firearms Policy—Improper use; handling or display of firearms	Reprimand to dismissal	15 days to dismissal	Dismissal	
7.004 (2nd paragraph)	Fighting or quarreling with Department members while either is on duty, which would bring discredit upon the Department or disrupt the work place	Reprimand to dismissal			
7.004 (y)	Soliciting for attorneys, bondsmen or other business person for personal gain	30 days to dismissal	Dismissal		2 years
7.004 (j)	Failing to provide emergency contact when off duty and away from residence in excess of 48 hours	Reprimand to 5 days	10 days to 30 days	30 days to dismissal	2 years
8.400	Feigning illness/malingering	Reprimand to 15 days	30 days to dismissal	Dismissal	

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7.004 (v) & (w)	Failure of any Department member to promptly report any misconduct against any citizen by another Department member or the failure of a commissioned member to take the appropriate action to prevent any misconduct	Reprimand to dismissal	15 days to dismissal	30 days to dismissal	
7.004 (l)	Offering money or other thing of value to an individual, whether a Department member or otherwise, for the purpose of directly or indirectly influencing a hiring, transfer or promotion decision	30 days to dismissal	Dismissal		
7.004 (l)	Accepting an offer, whether made by a Department member or other individual, to provide assistance in influencing a hiring, transfer or promotion decision with the knowledge that money or thing of value will be offered as inducement	30 days to dismissal	Dismissal		
S.O. 86-S-3	Violation of Department Pursuit Policy	Reprimand to dismissal	15 days to dismissal	Dismissal	2 years
7.004 (z)	Engaging in a strike, other work stoppage, work slowdown, or other job action against the Department, with the exception of non-violent informational picketing	Dismissal			
7.004 (aa)	Knowingly associating, on or off duty, with convicted criminals or lawbreakers under circumstances which could bring discredit upon the Department or impair an officer in the performance of his duty	10 days to dismissal			

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Manual/S.O. Reference	FINDING	PENALTY PROVIDED 1st Offense	2nd Offense	3rd Offense	Time Frame
5.250	Releasing Department records, reports or photographs without authorization	Reprimand to dismissal			
7.004 (bb)	Receiving discipline, imposed as the result of complaint investigations, 5 times within a 3 year period	5 days to dismissal			
7.004 (u)	Wearing of police uniform, or any part thereof, while off duty without authorization	Reprimand to 30 days	30 days to dismissal	Dismissal	
7.004 (p)	Receiving/soliciting money, gifts, rewards, gratuities or compensation for services rendered or expenses incurred, without Board approval, except for secondary employment	Reprimand 30 days	30 days to dismissal	Dismissal	3 years
7.004 (s)	Failure to obtain approval for secondary employment	Reprimand to 30 days	5 days to 30 days	30 days to dismissal	3 years
7.004 (t)	Interferring or interceding with a Board member; witness or potential witness; while under suspension or under charges	10 days to dismissal			
7.004 (c)	Insubordination - Disrespect to superior officer	Reprimand to 10 days	10 days to 30 days	30 days to dismissal	

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9.100 7.115 (h)	Failing to make required reports	Reprimand to dismissal	10 days to dismissal	30 days to dismissal	
7.004 (cc)	Failing to take appropriate action on or off duty, when an incident requiring police action comes to the attention of a police officer	Reprimand to dismissal	10 days to dismissal	30 days to dismissal	
7.004 (c)	Asleep on duty	Reprimand to dismissal	10 days to dismissal	30 days to dismissal	
7.004 (c)	Withdrawing, resigning or absenting from duty without leave	Reprimand to 5 days	5 days to 15 days	30 days to dismissal	2 years
S.O. 86-S-29	Chargeable accidents	Reprimand	1 day	2 days to 5 days	3 years
3.113 (d) 3.112	Failure to properly supervise subordinates; or to prefer disciplinary charges; or to take appropriate disciplinary action	Reprimand to demotion	10 days to demotion	Demotion or dismissal	
7.004 (c)	Failure to follow lawful order of superior officer, supervisor or commissioner (Includes written or oral orders)	Reprimand to dismissal	30 days to dismissal	Dismissal	
7.004 (dd)	Failing to conduct a proper investigation of suspected criminal activity or non-criminal incident which requires police action	Reprimand to 30 days	10 days to dismissal	30 days to dismissal	
7.004 (ee)	Permitting prisoner to escape through carelessness or neglect	Reprimand to 10 days	10 days to 30 days	30 days to dismissal	

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Manual/S.O. Reference	FINDING	PENALTY PROVIDED			Time Frame
		1st Offense	2nd Offense	3rd Offense	
3.115(c)	Failing to properly patrol assigned beat; loafing on duty	Reprimand to 5 days	5 days to 30 days	30 days to dismissal	
3.115(b)	Leaving assigned beat without notifying supervisor	Reprimand to 5 days	5 days to 30 days	30 days to dismissal	
7.004(ff)	Failing to acknowledge a radio call or; to respond to a dispatched call for service	Reprimand to 5 days	5 days to 30 days	30 days to dismissal	2 years
7.004(k)	Changing place of residence or telephone number without notifying commanding officer within 24 hours after change	Reprimand to 5 days	5 days to 30 days	30 days to dismissal	2 years
8.005	Violation of Department Residence Policy	Dismissal			
7.004(m)(n)(o) & 8.400	Violation of Department Sick Reporting Policy	Reprimand to 5 days	5 days to 15 days	30 days to dismissal	2 years
7.005	Violation of Department Policy related to prohibited political activity	Reprimand to 5 days	5 days to 15 days	30 days to dismissal	
Rule 10	Loss or damage to Department property through carelessness or neglect	Reprimand to 30 days			2 years
3.115(k)	Failure to follow evidence, property handling procedures	Reprimand to 5 days	10 days to 30 days	30 days to dismissal	
10.002	Violation of appearance standards—uniform or personal	Reprimand to 5 days	Reprimand to 15 days	Reprimand to 30 days	1 year

7.004(c) 3.115(d)	Failing to report for duty at appointed time	Reprimand to 5 days	Reprimand to 15 days	Reprimand to 30 days	1 year
7.004(gg)	Failing to follow radio procedure	Reprimand to 5 days	Reprimand to 15 days	Reprimand to 30 days	1 year
7.004(hh)	Suspension/revocation of drivers license; failure to notify superior/supervisor of suspension/revocation	Reprimand to 5 days	5 days to 15 days	10 days to 30 days	
9.206	Using unnecessary force in affecting an arrest, or; discourteous treatment or verbal abuse of any person or the public	Reprimand to dismissal			
7.004(ii)	Failing to promptly report to the Legal Division any legal service in a lawsuit which resulted from official acts or conduct	Reprimand to dismissal			
7.004(jj)	Engaging in any conduct or acts, on or off duty, which could bring discredit upon the Department or its personnel	Reprimand to dismissal			
7.004(c)	Superior abusing a subordinate in any manner	Reprimand to dismissal			
7.004(kk)	Failing to properly exercise the duties and functions associated with an individual's rank or position	Reprimand to dismissal	30 days to dismissal		
7.004(r)	Failing, upon receipt of proper notice, to attend any trial, hearing or proceeding or to remain in attendance until the conclusion thereof or excused.	Reprimand to 5 days	5 days to 15 days	30 days to dismissal	
7.004(mm) (89-S-1)	Unfit for Duty-Failing/Refusing Firearms Qualification	5 days to dismissal	15 days to dismissal	Dismissal	2 years

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

92-3739

LYNN MARTIN, SECRETARY, DEPARTMENT OF LABOR,
Plaintiff-Appellee,

v.

W.E. MONKS & COMPANY and EDGAR EDWARDS,
Defendants-Appellants

United States District Court
for the Southern District of Ohio
District No. 87-00977—Holschuk, District Judge

August 3, 1993, Filed

BEFORE: MERRITT, Chief Judge, KEITH and SUHRHEINRICH, Circuit Judges.

OPINION

Defendants-Appellants, W.E. Monks & Company ("Monks") and Edgar Edwards ("Edwards"), appeal a district court judgment for the Secretary of Labor ("Secretary"), in an action brought under Section 17 of the Fair Labor Standards Act of 1938, 29 U.S.C. § 201, et seq. ("the FLSA"). For the reasons stated below, we AFFIRM the judgment of the district court.

I.

The Secretary filed this suit on August 12, 1987, against Monks and its president and majority shareholder, Edwards, for failure to pay employee overtime wages, in violation of the FLSA. The FLSA requires employers to pay their employees one and one-half their regular pay rates for overtime, defined as all hours worked in excess of 40 in a work week. See 29 U.S.C. § 207. The FLSA, however, exempts employees that are executives, administrators and professionals from its overtime provisions. See 29 U.S.C. § 213.

After a four day bench trial, the district court entered a Memorandum and Order dated June 3, 1992, in favor of the Secretary. On June 4, 1992, the court entered a judgment enjoining Monks from continued withholding of back wages in contravention of the FLSA. The court also ruled that Monks should pay $19,517.14 in unpaid overtime compensation and that Edwards was liable as an employer due to his role as Monks' president and majority shareholder. Monks and Edwards ("the defendants") filed joint appeals, raising two issues regarding the district court's judgment. These issues are discussed seriatim below.

II.

The defendants contend that the district court erred in its determination that thirteen of its employees were not salaried employees, and thus exempt from the overtime compensation provisions of the FLSA. In its Memorandum and Order, the district court summarized the evidence against the defendants as follows:

> The alleged violation at the heart of this action is improper overtime compensation of thirteen Monks employees, generating an overtime pay shortage of $19,517.14. The Secretary alleges that these draftsmen, designers, and engineers are paid regular hourly rates multiplied by their hours worked, not compen-

sated at rates for hours worked over eighty in a two-week paid period as required.

During trial of this action, the Secretary produced witnesses, including Monks' employees and U.S. Department of Labor investigator Deborah Board, to establish that thirteen Monks' employees were deprived of the full overtime compensation as provided in the FLSA. The former and current Monks' employees testified that they were never paid the statutory rate for overtime when they worked more than eighty hours in a two-week pay priod. In fact, former Monks' employee Eugene Griffin stated that, after the initial Labor Department investigation in 1986, defendant Edwards told employees to record at least forty hours in each work week, even when they did not work forty hours, and then work more than forty hours the next work week to total an even eighty hours per pay period. Employees continued to be paid "straight time," not one and one-half their "straight time" rates, for overtime work.

(Memorandum and Order at page 6-7) (citations and footnote omitted). Investigator Board reviewed payroll records, employee earnings records, and employee time sheets in reaching a determination that Monks was in violation of the FLSA's overtime compensation provisions. The Secretary alleged that the following Monks employees did not receive adequate overtime compensation: Richard Braddock ($40.80), Michael Geary ($5,128.64), Eugene Griffin ($3,672.48), Thomas Howard ($2,090.57), Adel Magaziner ($1,771.68), Laura Martino ($1,714.69), Todd Miller ($2,521.34), Todd Borton ($94.21), James Brooks ($680.57), Robert Garrity ($1,345.75), Daniel Grieshop ($354.18), George Lucas ($57.23), and Dan Milosevich ($45.00). (Memorandum and Order at page 7-6)

The defendants contend that this Court should review de novo the district court's finding regarding whether the

employees were paid on a salary basis. They rely on *Brock v. Mr. W. Fireworks, Inc.*, 814 F.2d 1042 (5th Cir. 1987), as support for this proposition. In *Brock*, the Fifth Circuit addressed the legal standards for determining employee status under the FLSA, stating that:

> The ultimate finding as to employee status is not simply a factual inference drawn from historical facts, but more accurately is a legal conclusion based on factual inferences drawn from historical facts. We thus have held repeatedly that the ultimate determination of employee status is a finding of law subject to de novo consideration by this court.

814 F.2d at 1045. The *Brock* Court went on to explain that a court's factual findings regarding employee status is subject to the clearly erroneous standard of review, while the ultimate determination of employee status is subject to plenary or de novo review. We agree with this approach and find that it is consistent with Rule 52(a) of the Federal Rules of Civil Procedure. Rule 52(a) states that "findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Fed.R.Civ.P. 52(a).

Accordingly, we review the district court's findings of fact regarding whether the employees at issue were salaried employees under the FLSA by applying the clearly erroneous standard. We review de novo the district court's ultimate determination of whether the employees at issue were salaried employees and thus exempt from the FLSA's overtime compensation provisions.

The district court found that it was "evident from the pay records included as exhibits in this trial" that each of the employees at issue in this suit "worked more than eighty-hours in certain eighty-hour pay periods and that they were compensated at their regular rates instead of

one and one-half times those rates." (Memorandum and Order at page 8). As the district court noted, "the defendants do not dispute that the employees sometimes worked more than eighty hours in certain pay periods and that these employees were compensated for the extra hours at their regular rate." *Id.* Accordingly, the district court found that the employees at issue were not compensated at one and one-half times their regular salary for overtime work.

As a defense to the Secretary's allegations of overtime violations, the defendants contend that the employees at issue are exempt from the FLSA's overtime provisions because they are "professional" employees. The exemption of professional employees from the FLSA's overtime provisions is found at 29 U.S.C. § 213 and provides, in pertinent part, as follows:

> (a) The provisions of sections 206 and 207 of this title shall not apply with respect to—
>
> (1) any employee employed in a bona fide executive, administrative, or professional capacity, or in the capacity of outside salesmen. . . .

As the district court noted, 29 C.F.R. § 541, et seq. provides the factors to be considered when determining if an employee is a "professional" exempt from the FLSA's overtime provisions found at 29 U.S.C. § 207. (See Memorandum and Order at page 9). The district court correctly noted that when determining whether employees are "professionals" as defined under 29 C.F.R. §§ 541.311 (a) and 541.313, "at the onset of the analysis the FLSA is clear that a professional employee must be compensated on a salary or a fee basis, not hourly." *Id.* at 11 (citations omitted).

The district court concluded that the employees at issue were not salaried employees, explaining its ruling as follows:

> Evidence shows that the employees' billable work rates were based upon an annual compensation figure, what each would receive if he or she worked full-time, forty hours per week. However, testimony clearly shows that employees were never guaranteed that annual amount, barring absences of one day or more. In fact, on certain occasions, employees worked fewer than forty hours in a week and received less than a full period's pay, even if those absences were for less than one day. In short, employees might have been led to believe they would receive a certain salary amount but were not guaranteed that amount and often did not receive that amount, regardless of absences allowed under the FLSA.
>
> In fact, in an apparent attempt to compensate employees with a "regular" amount, defendant Edwards instructed employees to declare that they worked forty hours in a week on their time sheets, regardless of their actual hours worked, to receive their allotted amount of pay. However, they were told to "make up" the following week any hours that they had actually worked below forty the previous week, thereby working more than forty hours during that second week. Employees were paid for these extra hours at their hourly rates. Employees were paid less for days in which they worked less than the full day. This reduction is in direct opposition to the regulation's requirements for salary compensation. At other times, employees were instructed to assign part-day absences to vacation or sick leave time.

(Memorandum and Order at pages 13-14) (citations omitted). We find no reversible error in the court's findings that the employees at issue were not salaried employees. Additionally, we find no reversible error in the district court's ultimate conclusion that the employee's at issue were not "professionals" exempt from the FLSA's overtime provisions.

III.

Even if the employees at issue are found to be hourly employees rather than salaried employees, the defendants contend that the district court erred in its determination that the "window of correction" provision, 29 C.F.R. § 541.118(a)(6), was inapplicable in the instant case. Section 541.118(a)(6) provides, in pertinent part:

> Where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.

The district court ruled that the "window of correction" did not apply because "there was no inadvertence" in the defendants method of paying its employees and "the employees were not salaried." (Memorandum and Order at page 16). As support for its ruling, the court cited *Martin v. Malcolm Pirnie, Inc.*, 949 F.2d 611 (2nd Cir. 1991), *cert. denied*, —— U.S. ——, 121 L. Ed. 2d 222, 1992 U.S. LEXIS 6320, 113 S. Ct. 298 (1922). We agree with the court's ruling that the "window of correction" is unavailable to the defendants. However, the court misinterprets the requirements for the applicability of the "window of correction" by construing inadvertence as a requirement of § 541.118(a)(6).[1]

The correct interpretation of § 541.118(a)(6) is stated in *Keller v. City of Columbus, Indiana*, 778 F. Supp. 1480, 30 Wage & Hour Cas. (BNA) 1095, No. IP 89-179-C (S.D. Ind. 1991), where the court wrote:

> Whether the policy allowing hourly deductions was inadvertent need not be considered. The regulation

[1] We note that the *Malcolm Pirnie* Court, like the district court in the instant case appears to have similarly misconstrued 29 C.F.R. § 541.118(a)(6). See *Malcolm Pirnie*, 949 F.2d at 615-617.

> provides that the "window of correction" option applies when a deduction is inadvertent "or is made for reasons other than lack of work." . . . In this case, the policy allowed a deduction for missing work, not because there was a lack of work. The tangential debate about whether temporal duration of the policy qualified as "inadvertent" is unnecessary.

Id. at 40. Thus, the "window of correction" applies when an employer establishes that its employees were salaried employees and that the impermissible deductions from their salaries "is inadvertent, or is made for reasons other than lack of work." 29 C.F.R. § 541.118(a)(6) (emphasis added).

In this case, the deductions were made because the employees chose to absent themselves from work, not because there was a lack of work. Making deductions for personal time absences of less than a day is not permitted under the FLSA, but is insufficient to deny the employer the exemption, provided the other requirements of § 541.118(a)(6) are met. Since the employees at issue in this case were not paid as salaried employees, § 514.118(a)(6) is not available to the defendants. See *Dole v. Walker and Armstrong*, 763 F.Supp. 1052, 1054 (D. Ariz. 1990) ("Because defendants' employees are not paid on a salary basis and thus not exempt under the Fair Labor Standards Act, there is no preservable exempt status under § 541.118(a)(6)."). Accordingly, we agree with the district court's ruling that the defendants were not entitled to a "window of correction" exemption.

IV.

For the foregoing reasons, we AFFIRM the judgment of the Honorable John D. Holschuh, United States District Judge for the Southern District of Ohio.

DISSENT BY: MERRITT

MERRITT, Chief Judge, disenting. I agree with the majority that the factual findings of the district court are to be reviewed under the clearly erroneous standard. Based on my examination of the record, I believe those findings of fact are substantially correct. However, as the majority points out, the ultimate determination as to whether the employees in question are paid on an "hourly" or "salaried" basis is a question of law, reviewable de novo. I do not agree that, under a proper application of the FLSA regulations, the district court's factual findings can support its legal conclusion that the employees in question were paid on an hourly basis. This is especially true when the "window of correction" provision, 29 C.F.R. § 541.118(a)(6), is duly applied to excuse the two instances in which employees were improperly denied full compensation for a 40-hour workweek.

Defendant Marks is a small firm. The outcome of this litigation directly affects only 13 present and former employees who worked overtime during a period of several years; four of them are entitled to less than $100 each in back pay under the majority's ruling. However, the remaining employees add to this substantially, accounting for a total of nearly $20,000 to be assessed against the defendant firm, and I believe the justifications for doing so merit greater (and more critical) scrutiny than was afforded by the majority.

The district court's opinion, quoted at some length by the majority, slip op. at ——, indicates two primary factors driving its conclusion that defendants' employees were paid on an hourly, as opposed to a salaried, basis. Defendant Edwards instructed the employees to declare on their time sheets that they worked 40 hours each week even if they actually worked fewer hours that week. Although the employees were expected to "make up" any deficit in actual hours worked by working extra hours

during subsequent weeks, those hours, if reported as hours in excess of 40, would be compensated at the computed hourly rate of each employee, over and above their normal salary for the week. I believe this factual finding works in favor of defendants, rather than against them. Defendants assured this court at oral argument that the only penalty for continued failure to report to work during the normal business hours kept by the firm is the penalty reserved for any employee in any workplace for failing to meet the expectations of the employer: the threat of dismissal. As long as the employees perform enough work over an extended period of time (billed directly through to the firm's clients on an hourly basis) to justify their salaries, all would be well. This arrangement bears a striking resemblance to a law firm in which billable hours ultimately count far more in determining an associate's worth to the firm than the number of hours spent inside the building in any particular week.

The other finding which apparently influenced the district court's conclusion regarding pay status was that employees sometimes worked fewer than 40 hours in a single week during a pay period and consequently were paid less than the "predetermined amount constituting all or part of" their compensation, 29 C.F.R. § 541.118(a). First, this finding is facially inconsistent with a policy directing employees to declare 40 hours each week regardless of actual hours worked; it would be extremely hard for the employer to simultaneously enforce both policies. Second, a careful examination of the record reveals that only six of the thirteen employees ever had their pay reduced for any reason. Of those six, four had deductions made for reasons that are fully covered and excused by the FLSA regulations. For example, George Lucas began and completed his term of employment in the middle of pay periods during which he was not employed. This policy is expressly permitted under subsection 541.118(c). He also took a week's vacation for which he had not accu-

mulated leave time, and defendants did not pay him for that week. This policy as well is expressly permitted; see subparagraph 541.118(a)(2). The isolated deductions from the paychecks of Adel Magaziner, Eugene Griffin, and Robert Garrity were similarly valid (under subparagraphs (a)(3), (a)(2), and (a)(2), respectively). Only Todd Borton and Todd Miller had deductions made that may have been violative of the regulations.

My reading of the record thus indicates violations of the regulations affecting at most two employees for a minute total of 11 hours from a period in which all employees were compensated for some 175,000+ hours, or roughly six thousandths of one percent. The "window of correction" provision, § 541.118(a)(6), is tailor-made for such a situation. The majority properly concludes that such deductions may be excused even if not inadvertent; the subsection expressly applies to deductions made for reasons other than "when there is no work available," if the employer corrects its mistake and promises to comply in the future. But the majority then totally eviscerates the provision by denying the exemption to defendants, "since the employees at issue in this case were not paid as salaried employees." Slip op. at ——. This presents a tautology from which no employer could possibly escape: The employees are not salaried because impermissible deductions were made. Those deductions are impermissible (and not excused under the "window of correction") because employees have been found to be not salaried. If, as the majority implies, the employees' deductions could be excused under the window of correction if not for the earlier finding of non-salaried status, then it follows that those deductions should not be considered in making the pay status finding.

I find no evidence of hourly pay status in the policy of declaring 40 hours per workweek regardless of actual hours worked; as I have explained, this rather leads to the contrary conclusion. Likewise, I find no inexcusable

deductions to have been made from the salaries of defendants' employees. The district court's conclusion that the employees were paid on an hourly rather than a salaried basis is therefore bereft of support. The employers in this case have done nothing which should deny them the exemption from overtime compensation provided by the Secretary's own regulations. I dissent.

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 93-3279/93-3446

ROBERT B. REICH, SECRETARY OF LABOR,
Plaintiff-Appellee
Cross-Appellant,

v.

WILLIAM G. PIERCE,
Defendant-Appellant
Cross-Appellee.

On Appeal from the United States District Court
for the Southern District of Ohio
District No. 89-00015—Sherman, Magistrate Judge

December 20, 1994, FILED

BEFORE: CELEBREZZE, KEITH, and SUHRHEINRICH, Circuit Judges.

OPINION

PER CURIAM: Defendant-Appellant, William G. Pierce ("Pierce"), appeals the district court's final judgment finding Pierce's employees were not exempt from the overtime provisions of the Fair Labor Standards Act ("FLSA") and ordering payment of overtime compensation to 17 employees. For the reasons stated below, we AFFIRM.

I. Facts

Pierce was the founder, owner, and president of Pierce Processing, Inc. ("PPI"), an Ohio engineering consulting firm which advises manufacturing companies concerning the development of new manufacturing processes or packaging concepts. The company did over one million dollars in business annually between 1986 and 1988, and Pierce controlled PPI's operations and pay policy.

PPI paid its engineers, design managers, and designers a set annual salary which could be reduced if the employees worked less than a full day. PPI deducted compensation based upon the number of hours an employee was absent from work. The company computed employees' hourly rates by dividing the agreed annual salary by 2080 (40 hours times 52 weeks), and deducted pay for hours not worked from this calculation. Additionally, the firm paid all overtime hours at a straight hourly rate, rather than at a time and a half premium. Based on the above, in June 1988, compliance officer Sara Cazel ("Cazel"), from the Department of Labor's Wage and Hour Division, investigated PPI and concluded the firm had committed overtime violations.

On January 10, 1989, the Secretary of Labor ("Secretary") brought this action against PPI and Pierce alleging intentional violations of the overtime and recordkeeping provisions of FLSA and sought a permanent injunction, unpaid overtime compensation owned the defendants' employees, and liquidated damages pursuant to 29 U.S.C. § 201 et seq. PPI and Pierce denied the Secretary's allegations and asserted the action was barred by FLSA's statute of limitations.

On October 23, 1991, pursuant to an agreement between the parties, the district court transferred the case to a United States Magistrate Judge, who conducted a

trial on February 3, 1992. On March 26, 1992, the magistrate judge concluded the defendants had not violated the recordkeeping provisions of the Act. Additionally, the magistrate determined the employees were exempt from the overtime provisions, but only so long as defendants reimbursed their employees for the deductions from their pay and promised to comply with the Act thereafter.

Five months later, the defendants had not met the requirements of the magistrate judge's decision. On November 30, 1992, the magistrate judge gave PPI and Pierce 30 days to reimburse the employees. A month later, the defendants requested an extension for reimbursement until February 1, 1993. On February 9, 1993, recognizing the defendants failed to reimburse their employees and had not promised subsequent compliance with the Act, the magistrate judge determined defendants' employees were not exempt, and ordered Pierce to pay $10,842 in back overtime wages plus interest. The magistrate judge did not grant the Secretary's request for a prospective injunction or liquidated damages. This timely appeal followed.

II. Discussion

On appeal, Pierce argues:

(1) PPI's employees are not entitled to overtime pay; and

(2) the applicability of the "window of correction" in 29 C.F.R. § 541.118(a)(6) is dependent upon his financial status.

On cross-appeal, the Secretary argues the magistrate judge improperly failed to grant a permanent injunction prohibiting Pierce from engaging in future violations.

We address each of these issues separately below.[1]

[1] We note that Pierce, proceeding pro se, cannot represent PPI. A corporation must be represented by legal counsel and cannot proceed pro se. *Doherty v. American Motors Corp.*, 729 F.2d 334, 340 (6th Cir. 1984). It is insufficient that the person attempting the representation is an officer of corporation. *Ginger v. Cohn*, 426 F.2d 1385, 1386 (6th Cir. 1970). Because Pierce is not a lawyer, has not retained counsel and is proceeding pro se, he cannot represent PPI on appeal. Accordingly, the only appellant before the court is Pierce.

A. Pierce's Employees Are Hourly Workers Entitled to Premium Overtime Pay

FLSA provides that an employer must pay each employee "at a rate not less than one and one-half times the regular rate at which he is employed" for all hours worked in excess of 40 hours a week. See 29 U.S.C. § 207(a)(1). Employers are exempt, however, from paying premium overtime rates to employees "employed in a bona fide executive, administrative, or professional capacity . . ." 29 U.S.C. § 213(a)(1). An employer need not pay the premium to an employee who qualifies as an exempt bona fide professional paid "on a salary or fee basis." 29 U.S.C. § 541.3(e). An exempt professional is paid on a salary basis if she regularly receives a predetermined amount which is not "subject to reduction because of variations in the quality or quantity of the work performed." 29 C.F.R. § 541.118(a).

FLSA only permits deductions from a salaried employee's compensation for absences of a day or more. See 29 C.F.R. § 541.118(a)(2) and (3). Employers are prohibited from deducting an exempt professional's pay for partial day absences, and such deductions are inconsistent with payment on a salary basis. "An employee who can be docked pay for missing a fraction of a workday must be considered an hourly, rather than a salaried, employee." *Martin v. Malcolm Pirnie, Inc.*, 949 F.2d 611, 615 (2d Cir. 1991), *cert. denied*, —— U.S. ——, 112 S. Ct. 298 (1992).

Recognizing this law, on appeal, Pierce:

(1) attacks the validity of the regulation prohibiting partial day absences for salaried employees; and

(2) contends the magistrate judge improperly interpreted the regulation.

First, Pierce argues the prohibition of wage deductions for partial day absences promulgated by the Department of Labor in § 541.118(a) impermissibly conflicts with congressional intent of FLSA. Pierce incorrectly argues subsequent legislation reveals congressional intent providing for compensation of hourly employees only when they perform work and flexible unpaid leave.[2] Subsequent legislation does not dismiss the regulatory exemption for salaried workers and Pierce's argument must fail.

Next, Pierce alleges the magistrate judge erroneously interpreted the meaning of the term "day" as used in 29 C.F.R. § 541.118(a)(2). According to Pierce, because a "day" actually means less than a full, eight hour, working day, partial day absences constitute a "day" under the regulations. Thus, he properly docked employees' pay for missing a "day." We summarily reject Pierce's argument and find that for the purposes of 29 C.F.R. § 541.118 (a)(2) and (3), a working day constitutes the standard, eight-hour working day.

Rejecting the validity of Pierce's arguments, we find Pierce's employees are hourly workers entitled to premium pay and did not fall under the salaried exemption. The engineers, design managers, and designers did not qualify for exempt salaried professional status, because their compensation was subject to reduction because of the variations in the quantity of hours worked. These deductions did not result from absences of a day or more, but rather were for partial days. Because Pierce's employees were docked pay for missing a fraction of a workday, they cannot be considered salaried employees exempt from overtime compensation, but rather hourly workers entitled to overtime pay at one and a half times premium. Here,

[2] Pierce cites FLSA Amendments of 1947, 29 U.S.C. § 251 *et seq.* and the Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 *et seq.*

PPI failed to pay each employee at a premium rate for overtime. This failure violated FLSA.

B. The Applicability of the "Window of Correction" in 29 C.F.R. § 541.118(a)(6) is Dependant Upon Pierce's Financial Status

Pierce next argues the application of the "window of correction" exception should not turn upon his ability to reimburse docked employees. As noted above, the magistrate judge initially applied the "window of correction," allowing PPI to maintain the salaried, exempt from overtime status of certain employees. The magistrate judge conditioned the application of the "window of correction" upon Pierce's reimbursement of employees for past deductions and Pierce's promise of subsequent compliance. After Pierce's continued failure to reimburse the employees and to promise future compliance wtih the Act, the magistrate judge concluded PPI's employees were not exempt from the overtime provisions and ordered Pierce to pay overtime compensation for the entire period from January 9, 1987 to December 31, 1988.

Pierce claims his financial inability excuses his failure to reimburse the past deductions. Pierce proposes that the "window of correction" maintaining salaried, exempt from overtime status, should be removed only if an employer is financially able to repay deductions but refuses to do so. Pierce argues the magistrate judge erroneously removed the "window of correction" because he was financially unable to repay the deductions. We disagree.

FLSA provides that:

> . . . where a deduction not permitted by these interpretations is inadvertent . . . the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.

29 C.F.R. § 541.118(a)(6). The window of correction essentially allows "employers to treat otherwise eligible

employees as salaried regardless of the employer's one-time or unintentional failure to adhere to § 541.118(a)'s requirements." *Martin*, 949 F.2d at 616. Here, pursuant to the window of correction, the magistrate judge did not initially find exemption status had been lost on March 26, 1992. The magistrate judge, however, pursuant to the regulation, conditioned the finding on PPI's reimbursement of employees for deductions and promise of future compliance. Almost one year later, after Pierce had satisfied neither condition, the magistrate judge considered the salaried, overtime exemption status lost and ordered Pierce to pay those employees overtime pay. Contrary to Pierce's claims, the regulation provides for no extension of exempt status due to inability to pay. Even had such a provision existed, Pierce provided no evidence supporting his inability to repay the deductions. We therefore find the magistrate judge correctly removed the "window of correction" and ordered PPI to pay overtime rates.

C. The Magistrate Did Not Abuse His Discretion By Refusing to Grant a Permanent Injunction

On cross-appeal, the Secretary argues the magistrate judge improperly failed to grant a permanent injunction prohibiting Pierce from engaging in future violations. We disagree.

Although courts may enjoin violations of the overtime provisions of FLSA, 29 U.S.C. § 217, the imposition of an injunction under FLSA lies within the discretion of the trial judge. *Martin v. Funtime, Inc.*, 963 F.2d 110, 113 (6th Cir. 1992); *Wirtz v. Flame Coal Co.*, 321 F.2d 558, 560 (6th Cir. 1963). While we recognize the important purposes of FLSA compliance and PPI's failure to adhere to the magistrate judge's past orders, we cannot find the magistrate judge abused his discretion by not issuing a prospective injunction.

III. Conclusion

For the foregoing reasons, we find the magistrate judge properly determined Pierce's employees were not exempt from the overtime provisions of FLSA and ordered Pierce to pay overtime compensation. Additionally, the magistrate judge did not abuse his discretion denying the Secretary's request for injunctive relief. Therefore, we AFFIRM the final judgment of the Honorable Jack Sherman, Jr., United States Magistrate Judge for the Southern District of Ohio, Western Division.

APPENDIX J

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 94-2094

URSULA BENNETT, RONALD L. CHAVEZ, LARRY COOK, DONALD CRUTCHFIELD, RICHARD FUSCO, DIANE GUTIERREZ, DAVID IVERSON, HERMAN E. IVORY, MICHAEL MAESTAS, FELIMON MARTINEZ,) GREG MARTINEZ, CHARLES MELTON, STEVE V. MORA, RAMON ORDONEZ, MARY ELLEN ORTIZ, JOHN VAN SICKLER, MIKE SISNEROS, GRACE VALENCIA, VIKY WOODWORTH, BILLY ZAMORA,

Plaintiffs-Appellees,

v.

ALBUQUERQUE, CITY OF,
Defendant-Appellant,

and

ARTHUR BLUMENFELD, Chief Administrative Officer, individually and in his official capacity; RALPH RUIZ, former Director of the Department of Corrections, individually and in his official capacity; EARL C. WAID, Director of the Department of Corrections, individually and in his official capacity; ROBERT BROWN, Director of Employee Relations Department, individually) and in his official capacity,

Defendants.

(D.C. No. CIV-92-1029-WWD/DJS). (D. N.M.)

April 18, 1995, Filed

Before MOORE, BARRETT, and EBEL, Circuit Judges.

Opinion

By: DAVID M. EBEL

ORDER AND JUDGMENT *

This is an action brought under the Fair Labor Standards Act (FLSA).[1] Plaintiffs, all current or former employees of the City of Albuquerque, filed suit against the City to recover past due overtime compensation. In response, the City argued plaintiffs were not entitled to coverage because they hold exempt management positions.[2] Following a three-day bench trial, the district court rejected the City's argument and awarded damages in the form of past due overtime wages.[3] The City now appeals, challenging both the finding that the exemption is inapplicable and the magistrate judge's calculation of damages.

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of the court's General Order filed November 29, 1993. 151 F.R.D. 470.

[1] After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed.R.App.P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

[2] Although certain plaintiffs are no longer working at the detention center, the majority have retained their positions. Consequently, we will refer to the positions in the present tense.

[3] The parties agreed to proceed before a magistrate judge pursuant to 28 U.S.C. 636(c)(1).

I. Facts

Plaintiffs work at the Bernallilo County Detention Center in Albuquerque. The center is a prison facility housing approximately 800 inmates. It is comprised of two distinct towers and a booking area. Three types of employees staff the facility. Corrections officers are the most numerous. They are assigned to a designated area during each shift and are responsible for maintaining security and safety in that area. In addition, three or four lieutenants are assigned to rove the floors in each tower. They supervise and help the corrections officers when necessary. Finally, each shift has one captain who is in charge. Plaintiffs are lieutenants and captains at the facility.

The center operates on a twenty-four hour basis in three eight-hour shifts. During each shift, all employees are entitled to a one-half hour meal break, which historically has been considered paid time. It is undisputed that supervisors are on call during this break. Several plaintiffs testified they are often called away while eating to respond to center matters. They also stated they generally may not leave the facility and often catch up on paperwork during this period. In addition, plaintiffs are required to report to work thirty minutes before their scheduled shift begins. This is not considered paid time. The parties testified, however, that it is necessary to the efficient operation of the prison and allows a smooth transition between shifts.

Historically, supervisors at the detention center were paid overtime in the same manner as the corrections officers working under them. At some time following application of the FLSA to public employees, however, the City altered its overtime policy slightly and established a system whereby supervisors were eligible for "premium pay." This policy was, in most respects, the same as the previous overtime scheme. City representatives testified at trial that they thought premium pay was necessary to attract and keep qualified officers.

In 1988, several detention center employees went to the Albuquerque city council to express their concern over the working conditions and employment practices at the prison. In response, the City formed a task force to evaluate the various employee positions at the center. The task force determined that the positions of lieutenant and captain, then referred to as corrections supervisor and corrections facility supervisor, needed to be upgraded to reflect the additional responsibilities involved in those positions. The recommendations of the task force were accepted and the positions were upgraded so that more pay was available. Following this change, the lieutenants and captains continued to receive premium pay.

In 1990, an internal payroll audit was conducted, in large part due to citywide budget shortfalls. As a result of that audit, the City decided to end the practice of giving premium pay to lieutenants and captains. The City considered those positions management and concluded overtime was not required under the FLSA. Thus, starting in August of 1990 the lieutenants and captains no longer received any form of overtime compensation. They filed this lawsuit to recoup the resulting lost wages.

II. Discussion

A. Background

At the time the FLSA was enacted in 1938, it did not apply to state and local government employees. *See Lamon v. City of Shawnee*, 972 F.2d 1145, 1149-50 (10th Cir. 1992) (discussing history of the FLSA and its application to public sector employees), *cert. denied*, 122 L. Ed. 2d 785, 113 S. Ct. 1414 (1993); *see also* 57 Fed. Reg. 37,666-68 (1992) (same). It was not until 1986 that FLSA coverage was extended to the public sector. *See generally Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 533-34, 557, 83 L. Ed. 2d 1016, 105 S. Ct. 1005 (1985) (overruling *National League of Cities v. Usery*, which rejected application of FLSA to public sector). Only then did Congress, the courts, and

the Department of Labor (DOL) begin the process of integrating public sector employment issues into the well established regulatory scheme of the FLSA. In this case, we are called upon to undertake that task again.

The magistrate judge held plaintiffs are not exempt under the "bona fide executive" exception to the FLSA. As a result, he concluded they are entitled to overtime compensation under the Act. In calculating the appropriate damages, he found plaintiffs must be paid for their meal break because they are, in effect, on duty during that time. As a consequence of that finding, he determined the half-hour briefing period required at the beginning of each shift is essentially uncompensated overtime. The magistrate used the briefing time as a basis for awarding damages. He rejected the City's argument that the appropriate method for calculating any overtime is on a twenty-eight day cycle, rather than a weekly one. The City challenges each of these findings. We address them in turn.

Our standard of review is well settled. "We review the district court's factual findings under the clearly erroneous standard, and its ultimate conclusion that the captains [and lieutenants] were not exempt employees de novo." *Department of Labor v. City of Sapulpa*, 30 F.3d 1285, 1287 (10th Cir. 1994). As a substantive matter, the City has the burden of proving the exemption applies. *Id.* The plaintiffs must fit "plainly and unmistakenly" within the exemption's terms. *Reich v. Wyoming*, 993 F.2d 739, 741 (10th Cir. 1993) (citing *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392, 4 L. Ed. 2d 393, 80 S. Ct. 453 (1960)).

B. The Bona Fide Executive Exemption

When the FLSA was enacted, Congress included a provision requiring employers to pay overtime wages in an amount of one and one-half times the regular hourly rate of pay for employees working over forty hours a

week. 29 U.S.C. 207(a)(1). Exempt from this provision, however, were workers performing in a "bona fide executive, administrative, or professional capacity." 29 U.S.C. 213(a)(1).

Regulations accompanying the Act define this management exemption in some detail. See 29 C.F.R. 541.1(a)-(f). The bona fide executive is an employee

> who is compensated on a salary basis at a rate of not less than $250 per week . . . and whose primary duty consists of the management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof, and includes the customary and regular direction of the work of two or more other employees. . . .

29 C.F.R. 541.1(f). Here, there is no dispute that the plaintiffs earn over $250.00 per week. Therefore, we focus our examination on whether the plaintiffs are paid on a salary basis and whether their primary duties involve management. *See Hilbert v. District of Columbia*, 23 F.3d 429, 431 (D.C. Cir. 1994). The district court determined they met neither test.

1. The Salary Test

The regulations accompanying the FLSA define the scope of the salary basis test. Section 541.118(a) states an employee will be considered to be paid "on a salary basis" within the meaning of the regulations if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed. 29 C.F.R. 541.118(a).

Relying on this definition of the salaried employee, some courts have held that any policy which requires reductions

in pay for absences less than a day[4] is repugnant to the concept of salary basis. Thus, if the public entity allows partial day docking, the employee is not, by definition, salaried. As a consequence, the exemption cannot apply. *See, e.g., Kinney v. District of Columbia*, 994 F.2d 6, 11 (D.C. Cir. 1993); *Michigan Ass'n of Governmental Employees v. Michigan Dep't of Corrections*, 992 F.2d 82, 86 (6th Cir. 1993); *Abshire v. County of Kern*, 908 F.2d 483, 486-87 (9th Cir. 1990), *cert. denied*, 498 U.S. 1068, 112 L. Ed. 2d 848, 111 S. Ct. 785 (1991).

Here, the district court found plaintiffs were not paid on a salary basis because "the compensation [they receive] is directly or indirectly subject to deduction for less than one day's absence from work." Appellant's App. Vol. I doc. 14 at 2. While it is true that certain employees testified they had to use accrued benefits, such as vacation or sick time, to cover absences less than a day, there was no evidence of a policy to decrease the actual amount of pay received based on those absences. In fact, the testimony was that the City did not dock pay. See Appellant's App. Vol. III doc. 19 at 76-77, 149-50.

Section 541.118(a) is very specific. It speaks of deductions in the amount of compensation as being contrary to the salary test. It does not exclude from salaried status those employees who must use accrued benefits to cover partial day absences from work. Absent a specific policy to reduce the amount of pay, as opposed to reductions in accrued benefits, there is no violence done to the salary basis concept. *Barner v. City of Novato*, 17 F.3d 1256, 1261-62 (9th Cir. 1994). We agree with the court in *Barner* that a policy requiring public employees to reduce leave for partial day absences does not offend the salary basis test. The district court erred when it found otherwise. The City points out—and Plaintiffs do not contest—that captains and lieutenants were paid

[4] We find no allegations of docking for absences of greater than one day, in which case a distinction is drawn between different types of absences. See generally 29 C.F.R. 541.118(a).

a regular biweekly amount in excess of $250 per week. Because this regular amount was not subject to reductions in pay, we hold that Plaintiffs were salaried.[5]

This does not, however, end our inquiry regarding application of the executive exemption. The district court also held plaintiffs do not qualify as management employees under the duties test. In light of our conclusion that the district court erred when it held plaintiffs failed the salary test as a matter of law, we also consider the City's claims with regard to the second prong of the exemption.

2. The Duties Test

The second component of the executive exemption is the duties test. Under the DOL's regulations, this aspect of the exemption is satisfied if the primary duty of the employee is management. Indicia of management are, among other things, directing the work of others, appraising productivity, recommending promotions, handling complaints and grievances, and providing for the safety of employees. 29 C.F.R. 541.102(b); *City of Sapulpa*, 30 F.3d at 1287 (listing management duties). Throughout this litigation, the parties' dispute has focused on the plaintiffs' duties and how they spend their time during work hours.

[5] In light of this disposition—that the employees in question are not disqualified from exempt status solely based upon the City's practice of docking accrued benefits—we need not reach the other argument advanced by the City, that docking cannot preclude salaried status for public employees because of the principles of public accountability. In particular, we need not consider the DOL's rejection of this portion of the salary test for public employees beginning in August of 1992, or whether the test was valid prior to that time. *See Service Employees Int'l Union Local 102 v. County of San Diego*, 35 F.3d 483, 489 (9th Cir. 1994); see also 29 C.F.R. 541.5d(a) (directing that public employees who otherwise meet the salary test should not be disqualified from exempt status simply because they are paid under a system which takes into account principles of public accountability).

The plaintiff-lieutenants testified they spend approximately forty to sixty-five percent of their time performing nonmanagement functions. During that time they are doing the same work as the corrections officers, who are covered FLSA employees. The captains testified that although they spend only fifteen to twenty percent of their time performing the duties of a corrections officer, they also spend fifty percent of their time doing data entry, which they submit is purely clerical.

The determination whether an employee's duties are primarily management oriented is fact driven. *City of Sapulpa*, 30 F.3d at 1287. Where the evidence shows the employee spends over fifty percent of his or her time performing activities which are considered management, however, that will be considered the employee's primary duty. 29 C.F.R. 541.103. Alternatively, if the facts indicate an employee does not spend fifty percent of his or her time performing management functions, the employee may still fall within the exemption if he or she meets other criteria. *Id.* The additional criteria are the relative importance of the managerial duties as compared with other types of duties, the frequency with which the employee exercises discretionary powers, his relative freedom from supervision, and the relationship between his salary and the wages paid other employees for the kind of nonexempt work performed by the supervisor. 29 C.F.R. 541.103. The record reveals there was evidence submitted on each of these factors during trial.

Despite the parties' focus on the nature of plaintiffs' duties, the district court's findings of fact and conclusions of law do not reflect a considered analysis of these four supplemental factors. Indeed, it appears the court relied only on the discretionary authority factor when evaluating plaintiffs' primary duties. This was legal error. Therefore, we must remand with directions that the court make specific findings and legal conclusions using the appropriate standard.

Because we are remanding this matter to the district court for proper application of the law and regulations governing the bona fide executive exemption, we turn to the challenges the City has made to the court's damage calculations. If the court determines on remand that the exemption does not apply, these issues will still be relevant. The corollary issues are 1) whether the court erred in finding Plaintiffs' mealtimes compensable, and 2) whether the district court erred in failing to apply the twenty-eight day "tour of duty" rule for measuring overtime damages.

C. Compensability of Meal Time

The district court ruled plaintiffs should be compensated during their half-hour meal break. Specifically, the magistrate judge held the captains and lieutenants are "under such restrictions as to their movement and availability that the one-half hour lunch period should be considered as compensable time." Appellant's App. Vol. I doc. 14 at 3. Thus, Plaintiffs worked one-half hour during the pre-shift briefing period,[6] one-half hour during the lunch period, and seven and one-half hours during their regular shift, for a total of eight and one-half compensable hours per day. The magistrate judge used this eight and one-half hour figure to calculate damages.

"[A] police officer must primarily be engaged in work-related duties during meal periods to warrant compensation therefor." *Lamon*, 972 F.2d at 1157; see also 29 C.F.R. 785.19; 553.223(b).[7] Here, the evidence shows

[6] This is undisputed by the City.

[7] The *Lamon* court discussed this issue using the standards set forth in the regulations governing the twenty-eight day tour of duty exception. See 972 F.2d at 1155-58. As we note in part D, infra, it is unclear at this juncture whether that exception applies here. There is nothing in the record or the briefs, however, suggesting the regulations governing the forty hour work week would direct a different result under the facts presented here. See id. at 1158 n.18.

plaintiffs are on call during their lunch and may not leave the facility except under very limited circumstances. Plaintiffs testified their meal period is disrupted on a regular basis because they are needed elsewhere in the prison. These are factual findings which are not clearly erroneous. Consequently, we affirm the district court's decision on this issue.

D. Tour of Duty Exception

Although private sector employers must generally compensate employees for time spent over forty hours in a week, government entities employing law enforcement personnel are not so restricted.[8] The tour of duty, or "7(k)," exception allows employers to alter overtime standards for law enforcement personnel who work on alternative cycles of between seven and twenty-eight days. *See Birdwell v. City of Gadsden*, 970 F.2d 802, 805 (11th Cir. 1992). Under 29 U.S.C. 207(k)

> No public agency shall be deemed to have violated subsection (a) of this section with respect to the employment of any employee in . . . law enforcement activities . . . if—
>
> . . . .
>
> (2) in the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period as 216 hours (or if lower, the number of hours referred to in clause (B) of paragraph (1)) bears to 28 days, compensation at a rate not less than one and one-half times the regular rate at which he is employed.

[8] There appears to be no dispute that plaintiffs are law enforcement personnel. *See Avery v. City of Talladega*, 24 F.3d 1337, 1342-43 (11th Cir. 1994) (jailers at corrections center are law enforcement personnel under the FLSA).

The DOL regulations specify that law enforcement personnel may not work more than 171 hours in a twenty-eight day period without receiving overtime. 29 C.F.R. 553.201(a). Thus, anything over that amount is subject to a rate of one and one-half times the usual hourly pay.

It is undisputed that the City, through an interoffice memorandum from the Director of Corrections, adopted a twenty-eight day tour of duty standard on October 12, 1985. Appellant's App. Vol. III doc. 23. In addition, trial evidence reveals plaintiffs work on a seven-day calendar. See Appellees' App. at 1-134. The magistrate judge ruled, however, that the City's failure to implement a twenty-eight day wage and overtime schedule was fatal to its attempt to exercise any rights it had under 207(k). Inherent in this conclusion, however, is an assumption that the section requires employers to conform pay periods to match a twenty-eight day cycle. We must disagree with that conclusion.

A public employer need not structure its pay periods on a twenty-eight day basis to take advantage of the 7(k) exception. *Lamon*, 972 F.2d at 1151; see also 29 C.F.R. 553.224(a). Indeed, "other than adopting a specified work period, the employer is not required to restructure its overtime payment practices whatsoever; the employer has the option to do so." *Lamon*, 972 F.2d at 1152 (emphasis added). This court has rejected the argument that a public employer must make wholesale changes in its wage and hour practices to take advantage of the section. *Id.* ("That the measure affected little change does not render it a fiction."). The magistrate judge erred when he held otherwise.

Plaintiffs argue *Lamon* is distinguishable from this case because execution of an interoffice memorandum is insufficient to exercise 7(k) rights. In *Lamon*, the policy was made part of an administrative code. There is no language in Lamon, however, suggesting that incorporation in a city code is essential to effectuating the exception.

To the contrary, it is enough that the tour of duty exception be adopted as city policy. *See McGrath v. City of Philadelphia*, 864 F. Supp. 466, 476 (E.D. Pa. 1994) ("The 'establishment' of a 7(k) work period may be manifested by an appropriate public declaration of intent to adopt a work period of between 7 and 28 days.").

Here, both the district court's findings and the record are unclear as to whether the memo constituted city policy.[9] Plaintiffs have not argued, however, that the document is a sham, and it is undisputed that the memo came from, and was distributed to, the appropriate corrections facility personnel.[10] See *Lamon*, 972 F.2d at 1152 (noting that employer may not impose "sham changes" in scheduling and employment policies to evade the Act). Therefore, if the City can show this memorandum was made part of its wage and hour employment policy, it will be sufficient to invoke 7(k) rights.

Because both the record and the magistrate judge's order are unclear on whether this memorandum constituted city policy, however, we must remand for further factual findings on this question. If the memo did result

[9] The district court found that the memo "was never implemented in such a way as to cause hours for employees of Bernalillo County Detention Center to be computed on a 28 day 'tour of duty' basis." Aplt. App. at 97, P13. This language could be interpreted as a finding that 1) the legislature never adopted the memo, 2) the memo did not propose a 28 day schedule for actual payments, or 3) the city never effectively made the memo part of its wage and hour employment policy. Only the third alternative would preclude the City's invocation of the tour of duty exception.

[10] Plaintiffs suggest in their brief that the magistrate judge's order means other than what it says. They state that "the Magistrate Judge could have concluded that the [tour of duty] memo represented a policy which had been superseded long before Workers' claims arose." Appellees' Br. at 21. This is pure speculation, and we will not presume to know the magistrate's thinking on this issue. *See G.J.B. & Assocs., Inc. v. Singleton*, 913 F.2d 824, 831 (10th Cir. 1990) (appellate court should not second guess at the meaning of the district court's order).

in a policy change, the City is entitled to judgment as a matter of law on this issue.

In light of our disposition on these challenges to the district court's order, we need not address the City's remaining argument that there was insufficient evidence of damages. If plaintiffs prevail on remand, the magistrate judge should recalculate any damages using the standards we have announced here. In particular, if necessary, the magistrate judge should alter any award to reflect that certain plaintiffs ceased working for the City before or during this litigation. See Appellees' Br. at 23 (admission that magistrate judge erred in awarding full damages to plaintiffs no longer working for the City).

The judgment of the United States District Court for the District of New Mexico is AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings consistent with this order and judgment.

Entered for the Court

David M. Ebel
Circuit Judge

APPENDIX K

DEPARTMENT OF LABOR

Employment Standards Administration
Wage and Hour Division

29 CFR Part 541
57 FR 37666
August 19, 1992

Exemptions From Minimum Wage and Overtime Compensation Requirements of the Fair Labor Standards Act; Public Sector Employers

AGENCY: Wage and Hour Division. Employment Standards Administration. Labor.

ACTION: Final rule.

SUMMARY: This document provides revised final Regulations, 29 CFR part 541, governing the criteria for exemption from the minimum wage and overtime compensation requirements of the Fair Labor Standards Act ("FLSA" or "Act") for public sector employees employed in *bona fide* executive, administrative, and professional capacities. A special, limited exception from the exemption's requirement for payment "on a salary basis" is provided for certain public sector pay systems that reduce the pay of otherwise-exempt employees for partial-day absences when paid leave is not used to cover such absences, and for deductions due to budget-required furloughs.

EFFECTIVE DATE: September 18, 1992.

* * * *

II. Background

A. Summary of Statutory and Regulatory Provisions

The FLSA (29 U.S.C. 201, *et seq.*) requires that covered, non-exempt employees receive not less than the Federal minimum wage for all hours worked and overtime premium pay (at one-and-one-half times the regular rate

of pay) for all hours worked over 40 in a workweek. Section 13(a)(1) of the Act (29 U.S.C. 213(a)(1)) provides a statutory exemption from these requirements for employees employed in a *bona fide* executive, administrative, or professional capacity, as follows:

Section 13. (a) The provisions of sections 6 (except section 6(d) in the case of paragraph (1) of this subsection) and 7 shall not apply with respect to—

(1) any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (as much terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of the Administrative Procedure Act * * *).

The scope of the exemption provided by Section 13(a)(1) of the FLSA is defined and explained in Department of Labor regulations, codified at 29 CFR part 541. The regulations generally require that, to be exempt, employees must meet specified regulatory standards with respect to their job duties and responsibilities, and be compensated "on a salary basis" at a level that is not less than the stated amounts.[1]

Employees whose terms and conditions of employment meet the stated exemption requirements need not be paid the FLSA minimum wage or overtime premium pay for hours worked over 40 per week.

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[1] The existing exemption criteria include specified duties and responsibilities tests, in addition to a salary requirement. To qualify, an employee must be paid a weekly salary of a least $155 as an executive or administrative employee, and $170 as a professional, and must meet all the other tests (the "long tests" for exemption). If such employees receive $250 (or more) in salary, a shorter, less-stringent duties test applies (the "short test" or "upset salary test"). Consideration of these compensation levels will be undertaken in connection with any further rulemaking.

The regulations defining "salary basis" (at § 541.118) provide that an employee will be considered to be paid "on a salary basis" if the employee regularly receives each pay period a predetermined amount constituting all or part of the employee's compensation and the predetermined amount is not subject to reduction because of variations in the quality or quantity of work performed. Subject to specified exceptions, the employee must receive the full salary for any week in which any work is performed without regard to the number of days or hours worked, subject also to the general rule that an employee need not be paid for any workweek in which no work is performed.

Deductions may not be made " * * * for absences occasioned by the employer or by the operating requirements of the business," such as "deductions * * * for time when work is not available" (§ 541.118(a)(1)). Deductions also may not be made for activities such as jury duty, attendance as a witness, or temporary military leave (§ 541.118(a)(4)).

Deductions may be made from an employee's predetermined compensation without invalidating the employee's salaried status when an employee is absent from work for a full day or more for personal reasons, other than sickness or accident, as provided in § 541.118 (a)(2). Deductions are also permitted for absences of a day or more because of sickness or disability if the employer has a *bona fide* plan, policy or practice that provides compensation for loss of salary due to sickness and disability (§541.118(a)(3)). Deductions imposed "in good faith for infractions of safety rules of major significance" also will not affect an employee's salaried status (§ 541.118(a)(5)).

The regulations also state that the effect on the salaried status of an employee, and thus eligibility for exemption, when an impermissible deduction is made will depend upon the facts in each case. This provision permits an employer who makes impermissible deductions from the

predetermined compensation of an otherwise salaried employee to reimburse the employee for the deductions in certain circumstances, thereby restoring the exempt status of the employee. In particular, § 541.118(a)(6) provides:

> (6) The effect of making a deduction which is not permitted under these interpretations will depend upon the facts in the particular case. Where deductions are generally made when there is no work available, it indicates that there was no intention to pay the employee on a salary basis. In such a case the exemption would not be applicable * * * during the entire period when such deductions were being made. On the other hand, where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.

The salary requirement has been an integral part of the 541 regulations since 1940. The existing regulatory interpretation of "salary basis" dates back to 1954 (19 FR 4405; July 17, 1954). These provisions were developed from extensive hearings and record evidence showing that executive, administrative, and professional employees employed in industries then-subject to the FLSA, which excluded governmental employers, were nearly universally paid on a salary basis. Employers not compensating on a salary basis have had ample opportunity to conform their pay practices to the requirements if they chose to claim exemption for their employees, or pay overtime premium pay. In contrast, the public sector pay policies at issue in this rulemaking evolved over the years subject to constraints in statutes, ordinances or policies based on public accountability principles that preclude paying public employees for hours not worked, under systems that regarded management employees as being exempt from overtime.

B. Legislative History of the FLSA in the Public Sector

Since FLSA was enacted in 1938, the Congress and the U.S. Supreme Court have periodically acknowledged the special circumstances of, and different treatment to be accorded to, governmental employers and employees under the FLSA, as distinguished from the private sector. Originally, the FLSA did not apply to employees of States or political subdivisions. Congress extended coverage in 1966 to employees of State and public entities operating transit companies, hospitals, schools and related institutions. The U.S. Supreme Court upheld the constitutionality of applying the Act to such entities in *Maryland* v. *Wirtz*, 392 U.S. 183 (1968).

In 1974, Congress extended coverage to all public sector employees, exempting only elected officials and their immediate staffs. It did so with the stated intent to cover virtually all public sector employees who were not within the scope of the section 13(a)(1) exemption. The committee report accompanying the bill that became the 1974 Amendments described the provisions affecting Federal, State and local government employees in the following manner:

> Section 6 of the bill extends minimum wage and overtime coverage to about 5 million *non-supervisory* employees in the public sector not * * * [then] covered by the Act. * * * The bill will provide that virtually all *non-supervisory* government employees will be covered. * * * By the same token, the committee intends to cover all employees (*except professional, executive, and administrative personnel who are exempted under section 13 of the law*) in all civilian branches of the Federal Government." (H.R. Rep. No. 93-313, p. 27 (1974); emphasis added.)

In 1976, however, the U.S. Supreme Court considered the special nature of State and local governments under the FLSA and ruled that the FLSA's minimum wage and

overtime pay provisions could not constitutionally be applied to State and local government employees engaged in traditional governmental activities. (*National League of Cities v. Usery*, 426 U.S. 833 (1976).) The Court expressly overruled *Maryland* v. *Wirtz* with regard to the Act's application to public school and hospital employees, but National League did not alter the continued application of FLSA to employees engaged in activities that are not "traditional" functions of government.

In 1985, the Supreme Court reversed National League in *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). The Court reasoned that sufficient authority existed to apply the FLSA to State and local governments under the commerce clause of the Constitution and found that applying Federal regulation based on the distinction between "traditional" and "nontraditional" governmental functions was unsound and unworkable. In response to Garcia, Congress amended the FLSA in November 1985 to address particular concerns of State and local governments and to provide relief from liability during a temporary adjustment period after the Garcia decision. New provisions were added to allow the use of compensatory time off in lieu of cash wages for overtime in the public sector, with a higher maximum limit on the number of hours that can be accumulated by public safety and certain other employees; to include overtime exemptions for certain employment situations in which employees work dual jobs; and to provide special rules for public agency volunteers. The 1985 Amendments did not, however, affect section 13(a)(1) of the Act or specifically address the application of the executive, administrative, or professional employee exemption to State and local government employees. Neither the statutory changes nor the legislative history of the 1985 Amendments contain any significant references to section 13(a)(1) or 29 CFR part 541.

C. Public Sector Pay Systems and the FLSA

Some State and local government jurisdictions operate pay policies based on constitutional or statutory provisions while others are derived from regulations or policies that have evolved over the years. The rules and procedures of many of these pay systems were in place long before FLSA coverage of the public sector brought on by the 1985 Garcia decision. Such pay systems are generally premised on a concept derived from principles of public accountability that governmental employees should not be paid for time not worked due to the need to be accountable to the taxpayers for the expenditure of public funds.

At the time of Garcia, therefore, most public employers had in place compensation systems requiring all employees, regardless of how paid, to use accrued leave time or incur a reduction in pay for any absences from work. Such Governmental payroll systems prohibited paying employees for time not actually worked that was not covered by accrued leave, regardless of whether the time not worked was greater or less than one full work-day. Thus all public employees under such systems, including highly-compensated managers who otherwise would clearly be exempt from the overtime requirements, could be classified as non-salaried and thus non-exempt. As a consequence, few public employers compensated employees in a manner that would satisfy the "on a salary basis" provision required by the regulations.

The Department first observed this anomaly when responding to written inquiries from public sector employers following the Supreme Court's Garcia decision in 1985. It was also raised in public comments received on the Department's Advance Notice of Proposed Rulemaking (ANPR) on Part 541 published in the Federal Register on November 19, 1985 (see 50 FR 47696), before the 1985 FLSA Amendments went into effect. One issue

raised in the ANPR was whether the salary tests for exemption should be increased or eliminated.

During this same time frame, the Office of Personnel Management (OPM) issued regulations on the 541 exemption for executive, administrative, and professional employees of the federal government. Under OPM's regulations, exempt status was determined according to grade level and the position classification system rather than salary, and did not include a "salary basis" requirement.[2] With this background, the ANPR also raised the question "[s]hould the Department recognize individual State and local government civil service systems for classifying [executive, administrative, and professional] EAP employees in applying the exemption to employees of such governments?"

Two commenters responding to the ANPR pointed to the conflict between State and local laws and § 541.118 by noting that State or local laws frequently prohibit employees from being paid for time not actually worked, or not covered by annual, sick, or other types of paid leave. These commenters cited the example of an otherwise exempt public employee who is absent from work for personal reasons, or is unable to work because of illness or accident, where the employee has not accrued, or has exhausted, paid leave time, being paid only for the hours actually worked in accordance with applicable State or local law. Consequently, a public employer that makes deductions from pay for absence(s) computed on an hourly basis would not be in compliance with the "salary

[2] Section 4(f) of the FLSA provides that the Department of Labor will administer the Act for employees employed in the Library of Congress, the United States Postal Service, the Postal Rate Commission, and the Tennessee Valley Authority. OPM administers FLSA with respect to all other employees of the Federal Government except certain Congressional employees. See 29 U.S.C. section 204(f). Reorganization Plan No. 2 of 1978 (92 stat. 3783), and section 8 of the Fair Labor Standards Amendments of 1989 (Pub. L. 101-157).

basis" requirements in § 541.118 that allow for deductions to be made in such cases only for absence(s) of a full day or longer.

The Department also received comments expressing concerns about the "salary basis" requirement for exemptions for public sector employers in response to proposed regulations issued to implement the 1985 FLSA Amendments (51 FR 13402; April 18, 1986). These comments were noted in the preamble to the final rule as follows:

> Finally, several commenters requested various forms of special treatment for State and local governments with respect to the section 13(a)(1) exemption for bona fide executive, administrative, and professional employees, particularly with respect to the requirement in 29 CFR Part 541 that such employees be paid on a salary basis. The commenters argued that State and local governments should be permitted to make deductions from an exempt employee's salary for absences of less than a day. They argued that this change is necessary to recognize current payroll practices, as well as State and local government laws which preclude the payment of wages for hours not worked (except for earned leave).

On November 19, 1985, the Department of Labor published in the Federal Register (50 FR 47696) an advance notice of proposed rulemaking requesting the views of the public on any changes they felt were necessary in 29 CFR part 541. The comment period ended on March 22, 1986. However, the Department expects to publish a notice of proposed rulemaking concerning Part 541 during 1987. Interested parties will have an opportunity to offer comments on the subject matter of that regulation at that time.

In light of the separate rulemaking process with respect to part 541, it would not be appropriate for the Department to address this issue in developing a final rule for part 553.

* * * *

And:

Several commenters, including various cities, the National League of Cities (NLOC) and the National Public Employer Labor Relations Association (NPELRA), stated that 29 CFR part 541 should be revised to eliminate the requirement that an exempt employee be paid on a salary basis.

As discussed earlier under § 553.32, there is a separate rulemaking process with respect to part 541.

Therefore, it would not be appropriate for the Department to address this issue in developing a final rule for part 553.

This discussion of comments received on proposed 29 CFR §§ 553.32 (at 52 FR 2019) and 553.216 (at 52 FR 2023) was published in the Federal Register January 16, 1987.

* * * *

E. Developments in Private Lawsuits

The Wage and Hour Division's 1987 enforcement policy expressly stated that it was not intended to affect the rights of public employees to file private lawsuits under section 18(b) of the FLSA.[3] Since the Supreme

[3] Under section 10 of the Portal-to-Portal Act of 1947, Public Law No. 40, 80th Cong., ch. 52, 1st Sess. (29 U.S.C. 251 *et seq.*), an employer has a defense against liability for failure to pay minimum wages or overtime compensation under the FLSA if the employer pleads and proves that "* * * the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, * * * or any administrative practice or enforcement policy of [the Wage and Hour Administrator] with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect." (*See also* 29 CFR 790.13 & .18.)

Court's *Garcia* decision in 1985, numerous lawsuits have been filed by public employees seeking to recover overtime premium pay from their employers, and in many of these cases the resolution of the exempt status of employees turned solely on the court's reading of the "salary basis" requirement in the regulations. The courts have interpreted the construction of the regulations in different ways, reaching different results.

In circumstances where the public entity's pay practices called for the docking of pay for partial-day absences when leave was not available, some courts concluded that a salary was not "subject to" deductions where there was no evidence that the employee's pay was ever reduced; that only actual and not "theoretical" deductions could invalidate the salary basis of compensation;[4] and that rare instances of docking pay for absences of less than a day did not defeat eligibility for the exemption except in the workweek in which a deduction was made.[5] Other courts have allowed public employers to utilize the "remediation" provisions at 29 CFR 541.118(a)(6) to preserve the exempt status of employees in cases where inadvertent deductions were made from pay for absences of less than a day when leave was exhausted, the affected employees were reimbursed for such deductions, and the employer promised to comply in the future.[6]

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[4] See, e.g., *Atlanta Professional Firefighters Union v. Atlanta*, 920 F.2d 800 (11th Cir. 1991); *Harris v. District of Columbia*, 709 F. Supp. 238 (D.D.C. 1989).

[5] See, *D.C. Nurses Assn. v. District of Columbia*, 29 WH Cases 808 (D.D.C. 1988).

[6] See, e.g., *Hartman* v. *Arlington County, Va.*, 720 F. Supp. 1227 (E.D. Va. 1989), aff'd, 903 F.2d 290 (4th Cir. 1990); *Fire Fighters Local 2141* v. *City of Alexandria, Va.*, 720 F. Supp. 1230 (E.D. Va. 1989), aff'd, 912 F.2d 463 (4th Cir. 1990); *Harkins* v. *City of Chesapeake*, 29 WH Cases 1399 (E.D. Va. 1988); *Chadwick* v. *City of Norfolk, Va.*, 29 WH Cases 1407 (E.D. Va. 1988); and *Sarver* v. *City of Roanoke, Va.*, 29 WH Cases 1442 (W.D. Va. 1989).

In contrast, other courts determined that the exemption was inapplicable under the "'salary basis' requirement solely because a public entity's pay system required docking of pay when leave was not available. Some courts held that employees under such a pay system calling for deductions to be made when the employee is absent and has no leave are not paid "on a salary basis" even if no such deductions have in fact occurred.[7]

Such judicial interpretations and accompanying confusion were exposing governmental employers to potentially enormous and generally unexpected back wage liabilities for many employees who would clearly be exempt but for the treatment of leave and the docking of pay for partial-day absences when leave was unavailable. Following the denial of certiorari (January 1991) and petition for rehearing (March 1991) in Abshire, representatives of State and local governments, including the National League of Cities, the United States Conference of Mayors, and the League of California Cities, presented their urgent concerns to the Department arising from the flood of lawsuits being filed by public employees and requested prompt action by the Department to address the matter in light of the anticipated effects of post-Abshire litigation.

These State and local government representatives indicated that, without immediate action by the Department of Labor to revise the regulations for State and local governments, the potential liabilities for affected governmental entities would become devastating. They expressed concern over the fundamental inequity of courts granting windfall awards of across-the-board retroactive

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[7] See, e.g., *Abshire* v. *County of Kern*, 906 F.2d 483 (9th Cir. 1990), cert. denied, 111 S.Ct. 785 (1991), rehearing denied, 111 S.Ct. 1341 (1991); *Banks* v. *City of North Little Rock*, 708 F. Supp. 1023 (E.D. Ark. 1988); *D'Camera* v. *District of Columbia*, 693 F. Supp. 1208 (D.D.C. 1988); *Hawks* v. *City of Newport News, Va.*, 707 F. Supp. 212 (E.D. Va. 1988); *Harrison* v. *District of Columbia*, 30 WH Cases 557 (D.D.C. 1991).

overtime payments to public employees who never had any actual deductions made in their salaries, along with employees who rarely had such deductions, but all of whom would be entitled to substantial back pay under Abshire simply because their salaries were theoretically "subject to" the possibility of docking.[8] They asserted that this resultant windfall was not required by, and that Abshire was an extreme interpretation of, DOL's regulations. They stated their belief that § 541.118(a)(6) allows public employers to make occasional deductions in the salary of individual employees without defeating the salary basis for all employees, so long as the deductions are not significant in relation to the total compensation paid all similarly classified exempt employees; moreover, that the exemption would be lost for an individual employee if the deductions in pay are regular and recurring vis-a-vis that individual employee; that in the event of occasional deductions, a public employer should be permitted to pay overtime to the affected employees who have been docked for the specific work periods in which the deductions were made without losing the exemption for employees whose pay was not docked or for the docked employees in pay periods in which no docking took place; and, that in the event of regular and recurring deductions, the exemption should be denied to the affected employee only, in all workweeks it is claimed, including those weeks

[8] Mayor David Dinkins of New York City described the situation in an August 14, 1991 letter to Secretary of Labor Lynn Martin as follows:

The City of New York, along with many other jurisdictions, faces serious fiscal problems. To meet those problems we have already cut services and laid off thousands of employees. The layoff of State and Local government employees has been cited by the staff of the Federal Reserve Board as a reason for the continuing weakness in the economy. To exacerbate those fiscal problems and those layoffs to pay overtime to management employees because of the application to the public sector of a regulation designed for the private sector would be contrary to the public interest.

when no deductions are made. They supported their views by noting prior Wage and Hour opinion letters which they asserted stated that occasional docking of salary by a public employer, after exhaustion of available leave, would only result in a loss of the exemption for the employee whose pay was docked, and only then for the period (i.e., workweek) in which the deduction occurred (citing opinion letters of the Wage and Hour Administrator dated January 15, 1986 ((reprinted in Fair Labor Standards Handbook For States, Local Governments & Schools, supra, p. 69)); January 17, 1986 ((unpublished)) ((which states that "[w]here an occasional deduction that is not permitted by § 541.118 is made from the salary of an otherwise exempt employee, the exemption would be lost in that workweek when the deduction was made.")); and July 17, 1987 ((reprinted in Fair Labor Standards Handbook For States, Local Governments & Schools, supra, p. 159)) ((discussing "losing the exemption for that week" and noting "[i]t is our opinion that, although the employee would be considered a nonexempt employee during those weeks when paid on an hourly rate basis, it would not affect the employee's exempt status in other weeks when the employee is paid on a salary basis.")).) Some courts, they observed, had adopted positions consistent with their interpretations and, in fact, had relied upon the cited opinion letters in deciding that the exemption was still available to public employers operating such leave "systems" that reduced the pay of employees for absences of less than a day.[9]

[9] See, e.g., *DC Nurses Assn.* v. *District of Columbia*, *supra*, 29 W.H. Cases at 889 n. 1; *Fire Fighters Local 2141* v. *City of Alexandria, VA.*, *supra*, 720 F. Supp. at 1232; *Harris* v. *District of Columbia*, *supra*, 709 F. Supp. at 241.

F. The Department's September 1991 Rulemaking

Because of concerns that the unexpected liabilities threatened to seriously impair the fiscal integrity of many State and local governmental agencies, and would disrupt widespread, long-standing pay practices that had been designed to serve the public trust, the Department undertook separate rulemaking on the specific issue of application of the "salary basis" rule to public sector employees, while continuing its overall review of the full range of issues under 29 CFR part 541 raised by the public comments submitted on its ANPR of November 19, 1985 (50 FR 47696). Recognizing the special circumstances of public sector employment, under which employees are paid pursuant to pay systems established according to principles of public accountability, and in light of the potentially enormous, unforeseen liability which could threaten the governments' fiscal integrity as a result of retroactive overtime payments to public employees considered exempt by their employers, the Department proceeded with rulemaking on an expedited basis, finding good cause to waive the normal requirement for prior notice and comment.

The Department published an Interim Final Rule (IFR) on September 6, 1991 (56 FR 45824), inviting public comments for 30 days, modifying the "salary basis" rules affecting eligibility for exemption under section 13(a)(1) of FLSA for employees in the public sector only. The Department issued the IFR to allow State and local governments to continue their public-accountability pay systems without incurring liability for overtime pay under FLSA to employees who would otherwise be exempt from the overtime pay requirements. A new § 541.5d was added to the regulations to provide that an otherwise exempt public sector employee who is paid according to a pay system that requires the use of paid leave for partial-day absences for personal reasons or due to illness or injury and, when leave is not used or is exhausted, reduces the

employee's pay for such absences of less than one full work-day, will not be disqualified from exemption due to such pay system. The rule also provided that the exemption would not be defeated by deductions from salary caused by budget-required furloughs that are not regular and recurring, except in the workweek in which a deduction occurs. The Department left all other aspects of the salary test unchanged, as well as the duties and responsibilities tests of the exemption, as applied to employees in the public sector.

The Department also published a Notice of Proposed Rulemaking (NPRM) on the same day (56 FR 45828; September 6, 1991), inviting public comment for 30 days on a separate proposal at 29 CFR 541.118(a)(6)(ii) to allow public sector employers with pay systems as specified in the IFR, under which past deductions were made in the pay of otherwise exempt public employees for absences of less than one work-day for personal reasons or due to sickness or injury, to reimburse the employees for those deductions that occurred before the IFR went into effect and thereby restore the employees' eligibility for exemption. The regulatory proposal also provided that the "salary basis" component of the exemption would not be disallowed under such pay systems where no actual deductions were made before the IFR went into effect. Upon review of the comments submitted on the NPRM, the Department is withdrawing the proposal from further consideration and it will not be implemented as a final rule. See, published elsewhere in today's *Federal Register*, a document that withdraws this NPRM. The Department will be proposing a legislative remedy to address such retroactive liability.

In response to a request from representatives of labor organizations affiliated with the AFL-CIO and its Public Employee Department, on October 4, 1991, the Department extended the public comment period for an additional 30 days on both the IFR and the NPRM (see 56

FR 50256; 56 FR 50302), and the period for public comment closed on November 6, 1991.

The Department received a total of 398 comments during the comment period, generally as follows:

—229 in favor, from governmental entities, associations or individuals (23 States or State agencies and other entities (e.g., university, etc.); 124 cities (or agencies thereof); 46 counties (or agencies thereof); 29 associations of governments (e.g., National League of Cities, U.S. Conference of Mayors, National Association of Counties, etc.); and 7 others including law firms;

—169 opposed, from employees, unions and associations, law firms, or individuals (137 employees, including 114 individuals who are employee-plaintiffs in a lawsuit pending against the City of New York); 25 employee associations/unions; and 7 others, including law firms.

In addition, in response to the President's directive to Federal agencies to involve the public and other interested parties in evaluating existing regulations and programs to identify initiatives that would eliminate unnecessary regulatory burdens or otherwise promote economic growth, the Department published a Request for Information in the *Federal Register* on February 24, 1992 (57 FR 6301), requesting public input on the Department's current regulations and those under consideration in terms of identifying burdens placed on the economy, inhibitions to growth, and the benefits achieved by the regulations. Representatives of the governments of thirty States, the District of Columbia, Salt Lake City, Utah, Personnel Administrators of Texas Senior Colleges and Universities, the International Personnel Management Association, and the National Association of State Personnel Executives responded to this Notice offering views on the effect of Regulations, 29 CFR Part 541, on the public sector, stating that lawsuits were resulting in windfall back wage

payments as a result of technical violations of the "salary basis" test, and suggesting other areas of difficulty under the duties and responsibilities tests for exemption as an "administrative" employee under § 541.2. Several comments were also received suggesting revisions or review of other aspects of Regulations, 29 CFR part 541, including its application to the private sector. Some private sector commenters have suggested that modern compensation practices, especially those adopted to provide increased flexibility in the workplace and to reduce artificial distinctions among classes of employees, have made the salary basis test anachronistic. The Department is currently reviewing these comments, as well as those received in response to the 1985 ANPR, in order to determine what further rulemaking proceedings may be appropriate with regard to these and the other issues raised.

With regard to the public sector, which is the subject of this rulemaking, it is clear to the Department, after review of all of the comments, that certain aspects of the "salary basis" test for distingiushing exempt from non-exempt employees did not serve their intended purpose when applied to the public sector, as aspects of the "salary basis" requirement are unduly restrictive when applied in the public sector. In the Department's view, these aspects are not valid indicators of the *bona fides* of a claimed exemption under section 13(a)(1) in the public sector where every employee may theoretically be subject to potential docking for partial-day absences. State and local governments were thus being inappropriately deprived of the opportunity to apply the section 13(a)(1) exemption to their employees who would otherwise be properly exempt. For these reasons, the Department is of the view that public sector pay systems have to be analyzed differently from private sector pay systems.

The major comments received on the current rulemaking are summarized below, together with a discussion of the significant changes that have been made in the final regulatory text in response to the comments received. A

number of comments were submitted that focused on issues in the regulations on which the Department had not proposed changes or invited public comment, which the Department will not be addressing at this time. However, to the extent appropriate, the Department will consider these views in the context of its overall review of the full range of issues being considered in connection with the Department's November 1985 ANPR and February 1992 Request for Information.

III. Summary of Major Comments

As a preliminary matter, one law firm (Fisher & Phillips) commented that the narrative discussion in the preamble to the IFR (at p. 45824 of the September 6, 1991, *Federal Register*) incorrectly stated the requirements of the salary test in the exemptions discussed in part 541 when it suggested that "[c]ompensation must be greater than the amount specified in the regulations, and must be on a salary basis.'" The comment is correct. Under the regulations, compensation must be ". . . at a rate of not less than . . ." the amounts specified in the regulations.

Comment: Clarify the applicability of the remaining elements of the "salary basis" test.

Several commenters (American Federation of Teachers (AFT); International Association of Fire Fighters (IAFF); United Auto Workers (UAW)) commented that it was not clear that public employers continued to remain subject to all other aspects of the "salary basis" test in the regulations, stating that some public employers have attempted to argue in pending lawsuits that the Department's interim final rule completely eliminated all aspects of the "salary basis" test in the public sector.

The Department's interim final rule did not eliminate altogether the "salary basis" test in the public sector. A public sector employer must still be able to demonstrate that a claimed exempt employee satisfies all other aspects of the "salary basis" requirements for exemption. The

interim final rule states specifically that to be exempt under the new exception an employee must be one "* * * * who otherwise meets the requirements of § 541.118 * * *," the regulation which defines payment on a salary basis. The new § 541.5d added to the regulations provides that an otherwise exempt public sector employee would not be disqualified from exemption "* * * on the basis that * * *" the employee is paid according to public pay systems that require the use of paid leave and, when leave is not used or is exhausted, reduce employees' pay for absences of less than one full work-day for personal reasons or due to illness or injury. The rule also provided that eligibility for exemption would not be defeated by deductions from salary caused by budget-required furloughs that are not regular and recurring, except in the workweek in which a deduction occurs. Only partial-day deductions from pay when leave was not used or was exhausted and furlough-required deductions were addressed by the interim final rule. All other aspects of the salary test were left unchanged for the public sector, as these commenters pointed out.

* * * *

Comment: It is inappropriate to apply the section 13(a)(1) exemption for public sector employers differently than for private sector employers.

A number of commenters (AFT; Carrol, Burdick & McDonough on behalf of the California Department of Forestry Employees Association (Local 2881 IAFF); Brenda J. Carter, Esq.; Davis, Reno & Courtney on behalf of the Engineers and Architects Association, Los Angeles, CA; IAFF; International Union of Police Associations; LIUNA; National Association of Police Organizations; SEIU; and Zwerdling, Paul, Lebig, Kahn & Thompson) suggested that there is no basis for the Department to distingiush between the private and public sectors under the section 13(a)(1) exemption. Some of these commenters pointed to the 1985 FLSA Amendments as clear evidence that the lack of attention to this

issue by Congress in those Amendments reflected a specific Congressional intent not to distingiush between these two types of employment for purposes of applying section 13(a)(1) of the Act. Another commenter (Council of Engineers and Scientists Organizations) stated that the 1974 FLSA Amendments demonstrate that Congress intended to extend the same, equal protection to employees in the public and private sectors. One other commenter (AFSCME) suggested that the Department could have encouraged public employers to alter their policies concerning deductions of less than a day or that less drastic remedial measures could have been taken, such as altering the regulations to require that an actual deduction of pay occur before the exemption is lost.

The regulations defining the section 13(a)(1) exemption, largely in their present form, were adopted long before Congress extended the rights and protections of the FLSA to employees in the public sector.[11] Thus, the practice of docking public employees' pay for partial-day absences when paid leave was not available was not initially a concern in the administration of section 13(a)(1) of the FLSA.

Significantly, the existing regulatory requirements were adopted following public hearings in the 1940's and 1950's, which included evidence from witnesses showing that *bona fide* executive, administrative, and professional employees in the industries at that time subject to the FLSA were almost universally paid on a salary basis. These fact-based inquiries, conducted before the public sector became subject to the FLSA, did not include an examination of prevailing governmental pay practices. The historical record based on contemporaneous evidence also indicated that employees who did not meet the salary

[11] The general requirement that an exempt employee be paid "on a salary basis" has been an integral part of the regulations since 1940, and 29 CFR 541.118 ("salary basis") has remained essentially unchanged since revisions were last made in 1954.

test generally also did not meet the other requirements of the exemption.[12] The opposite is true with respect to the Department's current rulemaking, which was intended to address prevailing public sector pay systems operating under statute, ordinance, regulation, or other established public policy requiring all employees, including otherwise-exempt managers and executives, to use accrued leave time or incur a reduction in pay for any absences from work.

When FLSA coverage was extended to include public sector employees, separate provisions were not added to the regulations to define the section 13(a)(1) exemption in a manner that would distinguish public from private sector employment.

However, it is clear from a plain reading of FLSA's legislative history in 1974 (quoted in section II.B. above) that Congress intended for the section 13(a)(1) exemption to be available for public sector employees. Congress presumably was unaware that, because many public sector compensation systems preclude payment for hours not worked, these systems would, solely for that reason, be found to fail to meet the regulatory "salary basis" component of the exemption. In light of the public accountability principles prevalent in public sector pay systems, the regulatory requirements adopted before Congress extended FLSA coverage to State and local governments simply could not operate in a manner that effectively distinguished exempt from non-exempt public employees. The regulations were thus out of harmony with the intent of the statute because State and local governments could not practically avail themselves of the exemption intended by Congress, and thus were inappropriate as applied in the public sector.

[12] See, e.g., Proposed revision of Regulations, Part 541, under the Fair Labor Standards Act. Report and Recommendations (U.S. Department of Labor, Wage and Hour and Public Contracts Division, Washington, D.C. March 3, 1958), p. 2.

The fact that public sector employers had pay systems that prevent them from paying employees for part-day absences when paid leave is not available, and thus could invalidate the exemption for all employees "subject to" such pay systems under the principles set forth in *Abshire*, was not generally recognized to be the problem it is today when the 1985 Amendments were enacted. The 1985 legislation's silence on this issue is not indicative, in the Department's view, of an intent to make the section 13 (a)(1) exemption unavailable to public sector employers because of the nature of their pay systems.

Congress expressly authorized the Secretary of Labor to prescribe the requirements for exemption under section 13(a)(1) of the Act when it provided that "* * * such terms are defined and delimited from time to time by regulations of the Secretary * * *." Had Congress felt that the Department should not be free to revisit and revise its regulations in the future based on its enforcement experiences, it would have amended the statute to remove the Secretary's discretion to "* * * define[] and delimit[] from time to time by regulations * * *." The Congress has not made such a change throughout the history of the Act despite the numerous opportunities by the Congress over the years to amend section 13(a)(1).

Furthermore, the regulations promulgated immediately after enactment of the FLSA to implement section 13 (a)(1) of the Act contained a section entitled "Petition for amendment of regulations" which provided, in part, that:

> [I]n determining * * * future regulations, separate treatment for different industries and for different classes of employees may be given consideration.

This provision has remained a part of the regulations throughout their history. See 29 CFR 541.6 (1991). The Department has always had authority under these regulations to consider separate treatment of the public sector.

In light of the court decisions and representations by affected parties, the Department has determined that strictly applying all aspects of the salary basis rule to the public sector under section 13(a)(1) has produced results that do not effectuate the intended purposes of the Act. The Department considers it inconsistent with Congressional intent and inappropriate that the exemption be denied in the public sector to virtually all employees solely because their pay is subject to deduction for partial day absences where paid leave is not used, pursuant to pay systems that were established according to principles of public accountability, and, in some cases, imposed by law, ordinance or regulation, even before Congress extended the Act's coverage to the public sector. As a result, the Department has determined that these specific elments of the "salary basis" test are not valid indicators in the public sector of the bona fides of a claimed exemption under section 13(a)(1), and the revisions herein are necessary in order to give effect to the statutory exemption in the public sector as intended by Congress under the 1974 Amendments.

It is important to note that public pay systems, in many cases are the result of requirements in State constitutions and statutes, civil service systems, city charters and ordinances, or regulations. Even if it were procedurally possible to change personnel policies through amendments to constitutions and charters and the repeal of all applicable laws and ordinances, it appears to the Department that the changes in public policy and tradition required for governments to conform to the Department's salary basis requirements, as interpreted by the Abshire court, are not consisent with the public accountability principles supported and required by the public. Thus, with respect to AFSCME's suggestion that the regulations could have been revised to require an actual deduction in pay for the exemption to be lost, principles of public accountability embodied in the need to be accountable to the taxpayers for the expenditure of public funds only for

hours actually worked require that the exemption criteria for the public sector take into account the fact that the pay systems at issue reduce pay for partial-day absences when leave is exhausted. As initially expressed in the preamble of the IFR, the Department's understanding that public sector employers necessarily must be held to a higher standard of accountability regarding the use of public funds in paying public employees was confirmed by the comments received during the rulemaking process. Consequently, to limit the rule to disallowing exemption in those workweeks that pay is reduced for absences not covered by available paid leave, as suggested, would simply not be responsive and would result in a rule that remains inadequate for appropriately distinguishing exempt from non-exepmt employees in the public sector.

* * * *

Comment: The "salary basis" test should be deleted for public sector employees.

Four commenters (City of Bellingham, WA; County of Fairfax, VA; Florida League of Cities; and Law Department, Salt Lake City, UT) suggested that the "salary basis" test should be deleted altogether, or made inapplicable as in Senate Bill S. 1670 (Seymour, CA), 102nd Cong., 1st Sess., or replaced with a minimum salary level, increased from present levels, above which the "salary basis" test would not apply.

The Department's IFR was narrowly drafted in response to a demonstrated need to specifically address the particular fact that the existing "salary basis" test in the regulations produced inappropriate results when applied to public sector compensation systems which, based on principles of public accountability, reduce pay for partial-day absences for personal reasons or due to sickness or injury when leave is not used. All other requirements of the salary test were left unchanged as applied to employees in the public sector. Sufficient justification has not been shown in the comments to warrant eliminating al-

together the "salary basis" requirement or making it inapplicable to public sector employees paid above some minimum "upset" salary level.

Comment: Revise the regulations to reflect differences in the nature of public sector jobs.

Several commenters (CA Department of Personnel Administration; International Personnel Management Association; National Association of State Personnel Executives; and University of California) suggested that the concept that public sector employment differs significantly from that of the private sector should be expanded to the duties and responsibilities tests, noting in particular the "administrative" employee exemption in § 541.2 and perceived difficulties in applying "production work" concepts to the modern work place typical of today's government employees. One commenter (Human Relations Department, Chatham County, GA) suggested the Department pursue an entirely separate set of regulations for the public sector. These comments do not address the "salary basis" subject matter of the current rulemaking and will have to be dealt with at a latter date when revisions to § 541.2 are considered and proposed for public comment.

* * * *

Comment: § 541.118(a)(5) regarding deductions for penalties imposed for infractions of safety rules of major significance should be broadened to include disciplinary suspensions of public sector employees.

Several commenters (Arnstein & Lehr on behalf of the City of Naperville, IL; County Attorney, Fulton County, GA; Fisher & Phillips) stated that disciplinary situations are unique in the public sector, particularly in organizations like police departments, or different from those of the private sector because public employees have less freedom to terminate employees absent extraordinary circumstances and thus must use disciplinary suspensions without pay to rehabilitate or control behavior; that public employers have virtually no other penalty options; and that

suspension for a full week, which can be done without jeopardizing exempt status, is rarely imposed because of its severity. One commenter (County Attorney, Dade County, FL) suggested that disciplinary systems promulgated by statute, ordinance, administrative order, standard procedure, or collective bargaining should be treated in the same manner as the new regulation treats deductions for partial-day absences. One commenter (Fisher & Phillips) noted that such disciplinary systems were in place at the time of the Garcia decision and are premised on the concept that public employers should be accountable to the taxpayers for the conduct of public employees. Another commenter (City of Norfolk, VA) stated that failure to allow disciplinary deductions in the case of exempt employees could result in inconsistent application of discipline among exempt and non-exempt employees.

In the Department's judgment, the comments have not suggested a sufficient basis for distinguishing between the public and private sectors with respect to any recommended change in the rule. Although contrary assertions were made, the comments failed to demonstrate that public employers are significantly more restricted in the availability of options with respect to employee discipline than private employers. Although public employee terminations may require compliance with procedures designed to protect employee rights, termination for disciplinary reasons is not generally unavailable. In addition, other remedies for disciplinary infractions, such as official reprimands, demotions, and reassignment or restriction of duties, are generally available and used in the public sector.

Section 541.118(a)(5) was not open for comment during the present rulemaking. However, the Department expects to consider this issue as appropriate in proposed revisions of Part 541 at a later date.

* * * *

Comment: Clarify the meaning of the phrase "workweek in which such deductions occurred" in § 541.5d(b).

One commenter questioned during which workweek a furloughed employee was to be treated as non-exempt—the week the furlough day was taken, the week the reduced pay check is received, or one of the weeks for which the pay check represents the employee's compensation? The exemption is lost in the workweek in which the furlough day is taken and for which the employee's pay is accordingly reduced. The language has been clarified in the final rule.

Comment: Clarify that all improper deductions result in loss of the exemption only for the particular employee docked and only in the workweek of the improper deductions.

One commenter (City of Chicago) suggested, in effect, that the new rule relating to furloughs be extended to any and all improper deductions so that the exemption would be lost only in the week(s) in which deduction(s) occur. Depending on the circumstances surrounding the impermissible deductions actually made, the suggested clarification would not be consistent with the existing provisions at § 541.118(a)(6) which hold that the effect of making a deduction which is not permitted will depend upon the facts in the particular case. The Department considers the suggested change to be a significant departure from long-standing policy that is not substantiated by comment. Nor has any basis been presented to give special treatment in this regard to the public sector. It has, therefore, not been adopted in the final rule.

Comment: Include situations where the employee does not have permission to use available leave credits.

One commenter (Director of the Budget, State of New York) made the observation that negotiated agreements often require employees to obtain the employer's approval to be absent from work and be eligible to apply leave credit to be paid for the absence. Apparently, if the

absence is unauthorized under such agreements, the employee is denied the use of leave credits and pay is reduced.

If advance approval of an absence is required under the terms of the employer's leave policy and is not sought or is sought and denied in a particular instance, leave availability for such employee is no different than when leave has been "exhausted." The commenter's recommendation that language be added to address this condition has been adopted, and the final regulation has been clarified in this regard.

* * * *

Comment: Allow deductions for periods of illness or injury of one or more workdays regardless of whether there is a leave plan.

One commenter expressed concern that some small public employers have no sick-leave plans, and, thus, would not be able to deduct for absences of one or more days for illness or injury under § 541.118(a)(3) without losing eligibility for the exemption, or would have to adopt a minimal plan to satisfy the test for *bona fide* plan, policy or practice in order to permit such deductions without losing such eligibility. This problem arises for the public employer whose pay system requires deductions for any time not worked, but which does not have any kind of plan for compensating employees for lost time due to sickness or injury and which is located in a State that does not require a disability insurance plan. According to opinions issued over the years by the Wage and Hour Administrator, the plan that an employer would have to adopt to preserve exempt status for its employees can be simple and need not be particularly generous, so long as it is impartially allocated to the affected employees. In this regard, there is no requirement in § 541.118(a)(3) for any specific amount of leave to be stated under such plans, thus allowing considerable flexibility under the regulations.

* * * *

Comment: Delete the phrase "* * * (because the leave has been exhausted or by the employee's choice) * * *"

One commenter stated that this phrase is under-inclusive in that it does not take into account the practice of docking an employee's pay for being absent without leave (AWOL) for less than a day. The commenter suggested deleting the phrase. This concern has been addressed in the final rule with respect to the change made regarding systems that require employees to obtain advance permission to be eligible to utilize leave to be paid for absences.

Comment: Clarify the phrase "* * * requires the employee's pay to be reduced * * *"

One commenter observed that this phrase may be interpreted to exclude a public pay system where the practice of docking pay is, to any degree, *discretionary* with the public employer. This commenter suggested that the regulations be revised to read "* * * the public employee's pay can be reduced * * *"

The regulation protects public sector employers from a finding of non-exempt status solely because their pay system requires deductions from pay when leave is not used for the reasons stated in the regulations. If a deduction from pay (or the decision not to deduct) is based purely on the employer's discretionary choice, compensation would be "subject to deduction" for a reason other than that specified in the IFR. The change suggested by the commenter would broaden the exemption to include all deduction practices, whether or not required by the pay system, and whether or not mandatory or discretionary. We do not believe that this suggestion is consistent with the underlying justification for initiating the rulemaking, i.e., that principles of public accountability require that public sector employees not be paid for hours not worked that are not otherwise covered by an entitlement agreement, such as paid leave.

Comment: Delete the clause "* * * for personal reasons or because of illness or injury * * *".

One commenter proposed that this clause be deleted because it, too, would narrow the permissible reasons for docking pay for AWOL absences of less than a day. As previously discussed, AWOL absences have been addressed in the final rule, which treats unauthorized absences in the same manner as instances where leave is not available because it has been exhausted.

Comment: Clarify the status of leave deductions.

Several commenters (AFT; the cities of Alhambra and San Jose, CA, and Norfolk, VA; SEIU; UAW) observed that the rule referred to pay deductions only and was silent on the isue of whether deductions from paid leave accounts for partial-day absences can affect the determination of salaried status. Under the terms of this regulation, deductions from either accrued leave or pay when leave is not used for the reasons stated, will not disqualify an employee from being paid "on a salary basis." It is the Department's position that an employer can require an employee to substitute paid leave for absences of less than a day without losing the exemption for that week because, in such circumstances, the employee does not experience a deduction from pay.

* * * *

List of Subjects in 29 CFR Part 541

Labor, Minimum wages, Overtime pay, Salaries, Teachers, Wages.

Accordingly, part 541 of title 29 of the Code of Federal Regulations is amended as set forth below.

Signed at Washington, DC, on this 14th day of August 1992.

Lynn Martin,
Secretary of Labor

Cari M. Dominguez,
Assistant Secretary for Employment Standards.

Karen R. Keesling,

Acting Administrator, Wage and Hour Division.

PART 541—DEFINING AND DELIMITING THE TERMS "ANY EMPLOYEE EMPLOYED IN A BONA FIDE EXECUTIVE, ADMINISTRATIVE, OR PROFESSIONAL CAPACITY (INCLUDING ANY EMPLOYEE EMPLOYED IN THE CAPACITY OF ACADEMIC ADMINISTRATIVE PERSONNEL OR TEACHER IN ELEMENTARY OR SECONDARY SCHOOLS), OR IN THE CAPACITY OF OUTSIDE SALESMAN"

1. The authority citation for part 541 is revised to read as follows:

Authority: 29 U.S.C. 213: Pub. L. 101-583, 104 Stat. 2871; Reorganization Plan No. 6 of 1950 (3 CFR, 1945-53 Comp., p. 1004); Secretary's Order No. 13-71 (36 FR 8755).

2. Section 541.5d of subpart A of part 541 is revised to read as follows:

§ 541.5d Special provisions applicable to employees of public agencies.

(a) An employee of a public agency who otherwise meets the requirement of § 541.118 shall not be disqualified from exemption under §§ 541.1, 541.2, or 541.3 on the basis that such employee is paid according to a pay system established by statute, ordinance, or regulation, or by a policy or practice established pursuant to principles of public accountability, under which the employee accrues personal leave and sick leave and which requires the public agency employee's pay to be reduced or such employee to be placed on leave without pay for absences for personal reasons or because of illness or injury of less

than one work-day when accrued leave is not used by an employee because—

(1) permission for its use has not been sought or has been sought and denied;

(2) accrued leave has been exhausted; or

(3) the employee chooses to use leave without pay.

(b) Deductions from the pay of an employee of a public agency for absences due to a budget-required furlough shall not disqualify the employee from being paid "on a salary basis" *except* in the workweek in which the furlough occurs and for which the employee's pay is accordingly reduced.

[FR Doc. 92-19878 Filed 8-18-92; 8:45 a.m.]

APPENDIX L

TRANSCRIPT OF SERGEANT GUZY'S TRIAL TESTIMONY

* * * *

[68] Q As a Sergeant, is it your understanding that you could be disciplined for insubordination or other violations of the manual?

A Yes sir.

Q And if you were disciplined could you lose pay for a day or, —

A Yes sir.

Q You could be suspended without pay?

A That is correct.

Q Has that ever happened to you?

A Yes it has.

Q Could you tell just briefly about, how you were suspended without pay or how?

A In 1990, my wife inherited a house in St. Louis County. She moved there and I maintained my apartment in the city. The department decided that I was in violation of the residency requirement and I sustained a two day suspension without pay for that.

Q You actually lost pay out of that, so,—

A I lost two days pay.

[69] Q In that work week, did you work at least one other day and get paid for it?

A Yes.

Q Okay. I don't think I have anything specific. Let me just make sure. I don't have any other questions, thank you.

THE COURT: Cross examination.

CROSS EXAMINATION

BY MR. RENICK:

Q Did you agree to that suspension, Sergeant?

A Yes I did.

Q And that was for a violation of the residency rule, is that what you said?

A That was their determination, yes sir.

Q And that rule has since been changed, has it not?

A The rule's been changed?

Q Uh-huh, the penalty is changed?

A I think the penalty's been changed, yes sir.

Q There's no longer a penalty of a suspension for a violation of that rule is there?

A I think that I believe that the only penalty they allow for that now, and that is dismissal.

* * * *

EIGHTH CIRCUIT BRIEF OF APPELLEES/CROSS APPELLANT

* * * *

However, if this Court should determine that the suspension constituted an impermissible deduction which jeopardized Sergeant Guzy's status as a salaried employee, his exempt status should not be lost. The Secretary recognized in § 541.118(a)(6) that these types of situations must be analyzed on a case-by-case basis and if the deduction is inadvertent or made for reasons other than lack of work, the exemption will not be lost if the employee is reimbursed for the deduction and the employer promises future compliance. In this instance, the penalty for violation of the residency rule had been changed long before trial. If deemed necessary, the Police Board should be given the opportunity to reimburse Sergeant Guzy for the two (2) days pay lost in 1990 as a result of the suspension so that his salaried status is unaffected.

* * * *